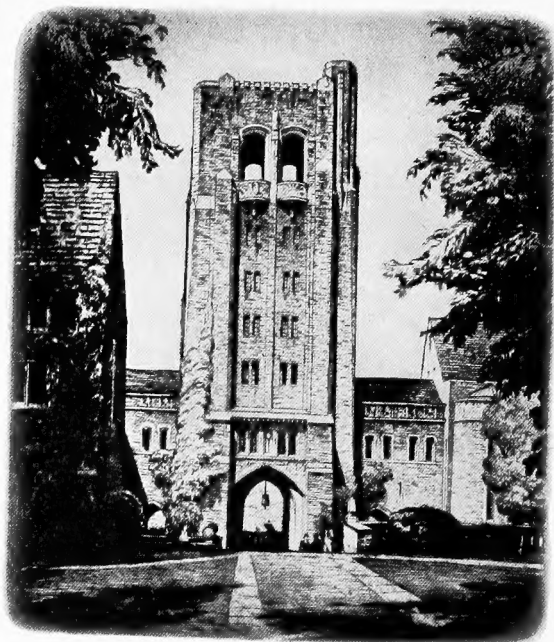


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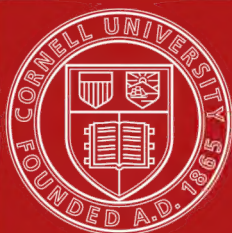
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COMMENTARIES
ON THE
LAW OF EVIDENCE
IN
CIVIL CASES

BY

BURR W. JONES

of the Wisconsin Bar

Professor of the Law of Evidence in the College of Law of the University
of Wisconsin

Viresque acquirit xundo

—Verg. Aen.

WITH THE LAW APPLICABLE TO EACH SECTION OF THE ORIGINAL
TEXT, REWRITTEN, ENLARGED AND BROUGHT WITH
AUTHORITIES UP TO THE PRESENT DATE

BY

L. HORWITZ

of the San Francisco Bar

VOLUME I

SAN FRANCISCO
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1913

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PREFACE.

It hardly calls for a preface to say that this work is what it professes to be—commentaries on the law of evidence as expounded by the well-known professor of the law on that subject of the University of Wisconsin—or to explain that the adoption of the Vergilian motto was by reason of its unique appropriateness. In 1896 the first edition of Jones on Evidence was published, and Mr. Jones then said that his primary object was to furnish a convenient textbook for trial lawyers, stating tersely the rules of law governing trials in civil cases. The measure of the book's success was such that in 1908 the necessity for a second edition was urgent, and the edition being exhausted, the familiar pocket edition of 1911 was issued and its popularity—justly merited—has been one of the factors in the production of the present commentaries.

The logic of the demand for the larger work is unanswerable. If the learned author could give—as he did—*multum in parvo*, the value of a *maximum in parvo* would be inestimable to those whose vocation calls for the best work on a given subject; and thus gathering strength from its great inherent value, the evolution of the present work is the result of painstaking effort on the part of the author and the appreciation of the law-book reading section of the community, which, in this country, perhaps before all others, is publicly and heartily expressed by reason of its need for apt and reliable case, principle and authority selected from the legion of decisions, and commented on after diligent research by competent hands.

When the task of revising and enlarging the second edition was assigned to me, I foresaw in it a labor of love, both by reason of the admirable groundwork upon which I had to work and by personal predilection for the class of work and the subject for discussion. At the same time I was forced to recognize, and I have continued to recognize

from the day the work was begun, that the responsibility lay heavier on me than it would have lain on the learned professor. He would have had little or no trouble to maintain his justly earned reputation—I have had the double task of “staying up the hands” of a lawgiver upon the mount, and at the same time of establishing my ability to do so creditably. Of that the critics will tell hereafter.

The lawyer needs the work of ready reference at hand, which it is to be hoped this work will supply. His pocket edition will furnish him with a reliable index to the commentaries, and he can acquire in a very short time what has taken years to compile for his use. In the response to the demand for the work, that is the main object of the present publication.

These commentaries do not run in any extravagant or ultra-scientific garb. They are dressed in the plainest homespun—they are for working purposes for work-a-day men (for the busy lawyer is a hard-worked workingman); and if they abound with case and illustration, it is that the man who seeks may find. If one is going to see Rome, is not a Baedeker’s guide better than Gibbon’s *Rise and Fall of the Empire*?

Herein will be found no extravagant titles—no flights of forensic diction—no newly raised hair-splitting contests, but an honest effort to set out the law of to-day, so that the intelligent reader may understand it, and verify each proposition by its accompanying citation.

LOUIS HORWITZ.

San Francisco, October, 1913.

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§ 1. **Introduction—The law of evidence.**—When we speak of the law of any subject, we are taken to mean those rules by which its consideration is to be governed. The laws of honor are the general rules of honorable conduct; the laws of thought are the fundamental principles of thought; the laws of war are the rules and usages recognized among civilized nations for regulating the conduct of the belligerents; the law of nature is the uniform occurrence of natural phenomena in the same way or order under the same conditions so far as human knowledge goes. (Standard Dictionary.) The law of evidence, and by “evidence” is always to be understood “legal evidence,” consists of those rules, statutory and judicial, which regulate the acceptance or rejection of that information to a legal tribunal which will justify a conclusion or judgment upon the matter in issue before it. Those rules have been adopted from the experience of ages, not only to regulate what evidence shall be admitted and what excluded, but the way in which it shall be presented or objected to—the mode and order which its component parts shall assume—what shall be the extent of its recognition and cogency—what quantity and quality of proof, if any, shall be called for with respect to any particular matter submitted. Such are broadly the rules of evidence which, taken together, are called the “law” of evidence. A rule of evidence is defined by Barker, P. J., in *Lapham v. Marshall* (51 Hun (N. Y.), 561, 3 N. Y. Supp. 601, 603), to be the mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure. In Sir James Stephen’s Introduction to his monumental Digest of the Law of Evidence, he named the great artery of law the substantive, which defines rights, duties and liabilities, and the next in importance the law of procedure by which that substantive law is applied to particular cases. “The law of evidence,” he says, “is that part of the law of procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides: I. What facts may, and what may not, be proved in such cases; II. What sort of

evidence must be given of a fact which may be proved; III. By whom and in what manner the evidence must be produced by which any fact is to be proved." After defining under the first head facts in issue and facts relevant to the issue, he names four classes of facts which are excluded from his definition of relevancy to the issue: "1. Facts similar to, but not specifically connected with, each other. (*Res inter alios acta.*) 2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*) 3. The fact that any person is of opinion that a fact exists. (*Opinion.*) 4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (*Character.*) To each of these four exclusive rules there are, however, important exceptions, which are defined by the law of evidence." As to the second division, he points out that some facts prove themselves, some require proof orally or by documentary evidence, and that such documentary evidence is furnished either primarily by the production of the document itself, or secondarily by a copy or an oral account of it. Under the third main division, the person by whom, and the manner in which the proof of a particular fact must be made, he lays it down that when a fact is to be proved, evidence must be given by the person upon whom the burden of proving it is imposed, except he is estopped from proving it by his conduct or relation to the opposite party; that the witness must be competent; that the evidence must be given upon oath or in certain cases without oath; that the witness may be examined and cross-examined and his credit tested. That brief statement, says the learned judge, will show what he regards as constituting the law of evidence properly so called. With such valuable dicta for comparison, the statutory definition of the law of evidence seems to cover all the ground necessary for the guidance for its administration. In the California Code of Civil Procedure, section 1825, and Lord's Oregon Laws, section 687, which may be taken as fair types of code definitions, it is thus comprehensively dealt with:

"The law of evidence . . . is a collection of general rules established by law:

"1. For declaring what is to be taken as true without proof;

"2. For declaring the presumptions of law, both those which are disputable and those which are conclusive;

"3. For the production of legal evidence;

"4. For the exclusion of whatever is not legal;

"5. For determining, in certain cases, the value and effect of evidence."

The consideration and interpretations of those rules by jurists furnish the basis for these commentaries on the law of evidence.

§ 1a. Introduction—History of the law of evidence.—A learned author has with infinite pains tabulated a complete survey of the historical development of the rules of evidence (Wigmore on Evidence, § 8). He separates it into seven marked divisions,—from primitive times to the twelfth century, thence to the sixteenth, thence to the seventeenth, thence to A. D. 1790, thence to 1830, thence to 1860, and thence to the present time. From the section quoted we gather that up to the year 1200 we have no reliable data, although to the formalities of the earliest tribunals there can be traced the sources of our present rules for the summoning of witnesses, the effect of an oath, and the necessary production of original documents. The next three centuries marked the establishment of the trial by jury and the separation of the process of pleading and procedure from that of proof. Between 1500 and 1700 the foundation of our present system of evidence was laid. In that period we find the regulation of the competency of witnesses, the rules of privilege and privileged communications, the rules for attorneys, the compulsory attendance of witnesses, the privilege against self-incrimination, the "parol evidence" rule, and the enactment of the Statute of Frauds. "The mark of the new period," says the historian, "is seen at the Restoration. Justice on all hands then begins to mend. Crudities which Mathew Hale per-

mitted, under the Commonwealth, Scroggs refused, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of evidence—find their first full recognition in the last days of the Stuarts.” The fourth period, ninety years, saw the final establishment of cross-examination by counsel, the rule for impeachment and corroboration of witnesses, the “best evidence” doctrine, and the publication of the first treatise on the law of evidence, by Chief Baron Gilbert. The same period gave us Blackstone’s Commentaries in 1768. The next forty years (1790–1830) saw a tremendous increase of the rulings upon evidence, there being more than in the preceding two centuries. “In 1814 and then in 1824,” he continues, “came Phillips and Starkie. . . . There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake’s treatise was balanced, in 1810, by Swift’s Connecticut book, while Phillips and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf’s treatise of 1842.” The thirty years ending with 1860 will be ever associated with the names of Bentham, Brougham and Denman. The Theory of Judicial Evidence in spite of, or perhaps by reason of, its philippic tone, created a mighty influence for good—an influence fortified by such doughty legal champions as Brougham and Denman. Their efforts culminated in England in the common-law procedure acts of 1852 and 1854, while in this country Livingston and Field were the sponsors of similar results. In the period following 1860 there has been no serious emendation of the law of evidence in England later than the judicature act of 1875 and the Rules of Court of 1883 and “the law of evidence attained rest.” It was an impossible state in this country with the constant addition of new states, while “New reports spawned a multifarious mass of new rulings in fifty jurisdictions—each having theoretically an equal claim to consideration.” If Bentham is, as he undoubtedly is, entitled to the credit of the English reform by reason of his bitter diatribes against

the anomalies and enormities of the law when he wrote, may we not recognize that Livingston's title of *The American Bentham* did not die with him, and that to-day are living many men who do not withhold a just criticism of the causes of the inextricable confusion into which the law of evidence has been thrown by the multitude and difference of decisions upon similar points? We venture to hope that the formation of a concise code will materially aid the uniformity of decision and save the countless repetition of similar opinions. The faults of bench and bar are gradually disappearing, and it is not extravagant to say that in a very few years the old-time abuses will be retold only as stories of the early vicissitudes of the law of evidence in this country.

§ 1b (1). Evidence—Necessity for exclusionary rules.—When we look back to the derivation of the word “evidence,” we are awed by the vast area the subject embraces, and from its original conception of “that which is seen out” (*e*—out, *video*—I see), necessity imperatively demands the alteration and limitation of the general definition to the specific subject of treatment. The laws of evidence and of legal evidence are not parallel, and the consideration of the former in its colloquial sense would in no wise help the study or elucidation of the latter. In its ordinary acceptation evidence is understood to be anything that makes evident or clear to the mind or such things collectively; any ground or reason for knowledge or certitude in knowledge; proof whether from immediate knowledge or from thought, authority or testimony; a fact or body of facts on which a proof, belief or judgment is based; that which shows or indicates.¹ “Evidence is and must be the test of truth, and is, I suppose, the ultimate ground on which we believe anything.”² It will readily be appreciated from this brief exposition of the general application of the term, that its breadth must be sensibly diminished before it can be of practical application to those rules which the science of law teaches in its own great department; and the observ-

¹ Standard Dictionary.

² Mivart, *Nature and Thought*.

ing student will mark how, as the study progresses on the lines of elimination, each successive proposition chips away from the marble block representing evidence as it is popularly accepted, until the perfect statue of legal evidence is at length revealed. Just as cross-examination has been defined as the art of what not to ask, so legal evidence is arrived at by the separation of that which the continuous wisdom of jurists has decided shall not be received as legal evidence. That wider and universal sense "in which it embraces all questions by which any alleged fact, the truth of which is submitted to examination, may be established or disproved"³ has to be restricted until from the legal and technical standpoint it becomes "a machine for the discovery of truth, fettered and restrained by municipal law, and by local regulations which vary greatly in different countries."⁴ The student, therefore, must set out on his expedition of inquiry equipped with the implements for cutting a path for himself, destroying in his progress the growths of popular and universal acceptations of the term and leaving only to flourish those which denote their utility to his service. He has nothing new to plant, for there is nothing to be added to the wisdom of centuries; he has only to clear away those growths which obscure the landmarks of the legal science. Our duty lies in enumeration, his, in cultivation, and his progress will be the easier for the foreknowledge of his responsibility to care only for that which will display cogent relation to the study of legal evidence. Conceding that evidence in its broadest sense is well defined as "any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact,"⁵ it is evident that the term as used in municipal law must have a very much more limited meaning. However desirable it might be in legal controversies involving the rights of property or the liberty of the citizen, if every fact which might have the slightest bearing on the issue could be adduced, it is manifest that

³ *Hubbell v. United States* (U. S.),
15 Ct. of Cl. 546, 606.

⁴ *Id.*
⁵ Bentham, *Jud. Ev.*, p. 17.

the limitations which surround judicial tribunals render this impossible. Courts are so organized that there must be some limit to the facts which may be given in evidence, as there must be an end of litigation. By way of illustration, if it is claimed that A has assaulted B, there are many classes of facts which would influence the judgment of persons investigating the controversy, which would not be received in courts of justice. The general estimation in which the parties are held in the community, the opinions and comments of neighbors as to the merits of the controversy, the fact that one of the parties has frequently been engaged in similar troubles, would all be matters which might have considerable weight in extrajudicial investigation. But if testimony of this character were to be uniformly admitted in actions for assault, or in other controversies, the expenses and delays of the litigation would be so oppressive that parties might better submit to wrong in silence, or to an unjust consequence, than incur the outlay and hazards of a lawsuit. It is true the reformers have zealously attacked and have broken down many of the artificial barriers which formerly prevented suitors from bringing the facts on which they relied to the ear of the court or jury; but it is hardly possible that the courts of civilized countries will ever seek to administer justice without the use of fixed, and to some extent arbitrary, rules of evidence. Considering these infirmities in judicial procedure, which must always be borne in mind, it is the lesser evil that there should be an occasional failure of justice than that litigation should be so expensive as to be only the luxury of the rich, or so protracted as to outlive those who may be compelled to become litigants. Mr. Stephen justly says that "the great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence."⁶ These exclusive rules excite surprise among laymen, for the reason that by their operation facts which seem to have a probative effect are often rejected, and the question is thus raised among them whether

⁶ Introduction to Steph. Ev.

the ends of justice are not thwarted by defects in judicial procedure.

§ 1c (1). **Same.**—While on the one hand the rules of evidence are looked at askance by laymen and much in the light of the prescription of the physician which as often repels as mystifies the patient, on the other hand they are accepted by the lawyers with satisfaction as denoting the limits within which the inquiry is to be conducted; and laymen and lawyers alike must recognize the necessity for regulating the law relating to legal evidence, and the object which the lawmaker, whether legislative or judicial, should have in view in proclaiming it. It will be conceded that a certain regularity should exist in the conduct of proceedings to establish any claim, and the common sense of the community has covered the whole ground by a collection of rules for the purpose, which is technically styled the law of procedure. The most important division of that law is that with which it is the part of this work to deal—the law of legal evidence. That law must be applied whenever a tribunal is called upon to define the rights, duties, obligations or liabilities of the parties to the cause before it. It has been ably summarized⁷ that the law so applied must determine (a) what facts in issue or relevant to the issue may, and what may not, be proved in such cases; (b) what sort of evidence must be given of a fact which may be proved; and (c) by whom and in what manner the evidence must be produced by which any fact is to be proved. While Sir James Stephen has epitomized his conclusions as above set out, he frankly admits that in his consideration and treatment of the vast subject, his endeavor was to cover what constitutes the law of evidence properly so called, and that he has excluded what may be proved under particular issues; that he has also dealt shortly with the law of presumption, of practice, and provisions as to the proof of certain particulars, such as the various kinds of public documents. These subjects are so allied to the law of evidence in general that incidental comment upon

⁷ Introduction to Steph. Ev.

them is well-nigh inevitable in the treatment of the main subject. The evidence under particular issues is, as Stephen properly puts it, more matter for a treatise on pleading, but, so far as it is possible, wherever the subject comes within the jurisdiction of the commentator, it will be found to have been dealt with.

§ 2 (1). Evidence—Effect of jury system on rules of.—All reliable historical data in any way connected with the subject of evidence, or rather the evolution of legal evidence, of necessity are valuable to the student, and “it is here that Mr. Justice Stephen’s treatment of the law of evidence is perplexing, and has the aspect of a *tour de force*. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter, and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy. It is to be observed that by relevancy he always means logical relevancy; the common but uninformative distinction between legal and logical relevancy is not made by him.”⁸ Professor Thayer lucidly points out that our law of evidence bears strongly the family features of the jury system. He directs attention to the two fundamental conceptions (a) that, without any exception, nothing which is not, or is not supposed to be, logically relevant, is admissible, and (b) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible; and that it is obvious that logical relevancy cannot be the sole test of admissibility. “Some things are rejected as being of too slight a significance, as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or over-estimated by that body; others, as being impolitic, or unsafe on public grounds; others on the bare ground of precedent. It is this sort of thing, as I said before,—the rejection on one or another practical ground, of what is really probative,—which is the characteristic thing in the law of evidence; stamping it as the child of the jury sys-

⁸ Thayer, *Cas. Ev.*, p. 3.

tem.”⁹ It is abundantly clear that the many rules which in our courts of justice govern the introduction of facts for the discovery of the truth are very closely associated with an institution very dear to the Anglo-Saxon race,—that of trial by jury. In a celebrated case Lord Mansfield called attention to the fact that “In Scotland and most of the Continental states, the judges determine upon the facts in dispute as well as upon the law, and they think there is no danger in their listening to evidence of hearsay because, when they come to consider their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.”¹⁰ While we cannot in this place trace the development of the exclusion of that which is not legal evidence from our system of jurisprudence, it can well be imagined that in a primitive community every little shred of so-called evidence would be demanded by those holding the inquiry; and that very soon, as the community grew and causes became more numerous, the necessity for excluding mere gossip became imperative, so that the triers or jurors as they ultimately became should have the opportunity to give other litigant claimants a hearing. The temptation to give utterance to faulty conclusions, to conclusions based on faulty premises, to conclusions which are merely intuitive, that inordinate desire to hear one’s self talk which the Romans styled the “*Cacoethes loquendi*,” all these had to be passed under censorial treatment before the tribunal could possibly mete out justice. The earliest judges must have been impressed with the stringent necessity of making a distinction in the mode of recounting past events between the gossip of neighbors, however interesting, and the solemn assertion under oath of events affecting the life and the liberty of the subject. However partial the attitude of the mind of the Englishman may be

⁹ *Id.*

¹⁰ Berkeley’s Peer. Case, 4 Camp. 414; Thayer, Cas. Ev., p. 4.

toward trial by jury, the importance of that system has lost nothing by its transplantation to American soil. Our system of segregating the provinces of judge and jury has shown a distinct improvement, and our method of instructing the jury not only indicates the serious attention given by jurists to the laws regulating the evidence to be placed before juries, but is itself a salient witness to our acknowledgment that the elaboration of our laws upon the subject owes its initiative force to the existence of that trial by jury which in one form or another is older than the memory of man may run.

§ 2a (1). **Same.**—That the jury system should have lent its color to the laws of evidence is not so anomalous as at first may appear, for the jurors were in the olden time themselves styled witnesses. We are told by no less an authority than Chief Justice Fortescue, who presided over the King's Bench from 1442 to 1460, how justice in other countries failed from the death or failure of witnesses. "In England, on the other hand, the witnesses must be twelve; they are chosen by a public official of high standing, acting under oath, from among persons from the neighborhood where the matter in question is supposed to exist or take place, men of property, indifferent between the parties, subject to challenge by both, acting under oath. They are informed of the controversy by the court, the parties or their counsel, and their witnesses, and confer together afterward privately and with deliberation, and return and give their answer publicly in court. . . . These witnesses are neighbors, able to live out of their own property, of good name and unsullied reputation, not brought into court by a party, but chosen by an official who is a gentleman and indifferent, and required to come before the judge."¹¹ Professor Thayer, commenting on these chapters of Fortescue, says: "In this account it is obvious how great a figure that old quality of the jury still plays; it is the chief thing; the point of all this elaborate contrast is the greater number

¹¹ Fortescue, *De Laudibus Legum Angliæ* (cc. 25, 26); Thayer, *Prel. Treat. Evid.* 130-132.

and better quality of the English witnesses and the greater security there is in the impartial methods of procuring them.”¹² The excerpt and the comment contain one of the keys to that relation between the jury system and the evidence system which at times produces problems difficult of solution; but the historical knowledge will be found of use to the student who is not content merely with “following the rivers,” but who seeks the springs from which the rivers flow. The laws of evidence may be taken, therefore, as in great part owing their origin to the exigencies created by the jury system, and, so far as can be gleaned from the records of primitive people, the method of determining disputes has always involved the hearing of the claim and defense on lines peculiar to the particular jurisdiction exercised. Given, then, this original state of things, the apparent transition from the crude and aboriginal views of what might be offered before the tribunal, to the present elaborately indexed guide to what is and what is not evidence, is in reality the evolution which growth and interchange of idea, of commerce, and of education has fortunately and relentlessly demanded.

§ 3 (2). Evidence—Definitions of, as used in municipal law.—Having considered the ordinary signification of the term “evidence,” it is our province in the orderly treatment of the subject to inquire in what manner the term has been explained by leading text-writers and jurists. To a great extent, however, these definitions have not retained their usefulness by reason of the adoption of the code system of jurisprudence in many of the states. It must not be lost sight of, nevertheless, that a code definition of such well-known terms produces, as a rule, the effect of a superimposed photograph, presenting all the best features of the originals. The more limited meaning of the term “evidence,” as used in legal proceedings, is well illustrated in the definition of Mr. Stephen, according to which evidence includes (a) statements made by witnesses in court under a legal sanction in relation to matters of fact under inquiry

¹² Thayer, Prel. Treat. Evid. 130-132.

and (b) documents produced for the inspection of the court or judge.¹³ This definition is open to the criticism that it does not include those facts which in judicial proceedings may be addressed directly to the senses of the court or jury. Other definitions which have met with approval are the following: According to Blackstone: "Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other."¹⁴ Says Professor Greenleaf: "Evidence in legal acceptance includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."¹⁵ Starkie says that "That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from comment and argument on the subject, falls within the description of evidence."¹⁶ Professor Thayer asks himself the question, "What is our law of evidence?" and thus answers it: "It is a set of rules which has to do with judicial investigations into questions of fact. . . . These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact. But they do not regulate the process of reasoning and argument. . . . When one offers 'evidence,' in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact. . . . In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence. Evidence, then, is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof,

¹³ Stephen, *Ev.*, art. 1.

¹⁴ Blackstone, *Commentaries*, 3, 367.

¹⁵ 1 *Greenl. Ev.*, § 1. This definition has been criticised for including

not only facts but arguments. See *Chamb. Best, Ev.*, § 11.

¹⁶ Starkie, *Ev.*, p. 9.

as the basis of inference in ascertaining some other matter of fact.”¹⁷ Wigmore says: “Evidence represents any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a conviction, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.”¹⁸ Dr. Wharton’s definition reads: “Evidence includes the reproduction, before the determining tribunal, of the admissions of the parties and of facts relevant to the issue.”¹⁹

§ 3a (2). Other definitions.—Legal editors have collected other definitions which are worthy of perusal.²⁰ Among them are the following: “Evidence is any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.”²¹ Evidence, “as a part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.”²² “Evidence, as defined by lexicographers and law-writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any circumstance which affords an inference as to whether the matter alleged is true or false is therefore evidence, and is commonly understood to be within the meaning of that term.”²³ Wigmore’s definition stands the test of that analysis to which it was subjected by the learned author of it.²⁴ Bentham’s treatment of it commands attention. He says: “By the term ‘evidence,’ con-

¹⁷ Thayer, 3 Harv. Law Rev. 142, 147.

¹⁸ 1 Wigmore, Ev., p. 3.

¹⁹ Wharton on Evidence, § 3.

²⁰ Words and Phrases, Ed. Staff. Nat. Rep. System, vol. 3, “Evidence.”

²¹ Cook v. New Durham, 64 N. H. 419, 13 Atl. 650 (citing 1 Benth. Jud.

Ev. 17); State v. Ward, 61 Vt. 153, 17 Atl. 483 (citing 1 Best, Ev., § 11).

²² Kring v. Missouri, 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443.

²³ O’Brien v. State, 69 Neb. 691, 96 N. W. 649, citing this section.

²⁴ Wigmore on Evidence, p. 3, from which we have taken some of the definitions in the text.

sidered according to the most extended application that is ever given to it, may be, and seems in general to be, understood, any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative of its existence. . . . Taking the word in this sense, questions of evidence are continually presenting themselves to every human being every day, and almost every waking hour of his life. . . . Hereafter, the only sense in which the word is used is that in which the application of it is confined to juridical, or say legal, evidence. Under this limitation, then, evidence is a general name given to any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact—of some fact by which, supposing the existence of it established, a decision to a certain effect would be called for at his hands.”²⁵ Wills says: “Every conclusion of the judgment, whatever may be its subject, is the result of evidence—a word which . . . is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.”²⁶ Bouvier says: “Evidence is that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue; or, it is that which is legally submitted to a court and jury, or to either of them, to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings, and distinguished from all comments or arguments.”²⁷ Best defines judicial evidence as “the evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them. By *facts* must here be understood the *res gestae* of some suit or other matter to which when ascertained the law is to be applied; for although, in logical accuracy the

²⁵ Jeremy Bentham, *Rationale of Judicial Evidence*, b. 1, c. 1.

²⁶ Wills on Circumstantial Evidence,

²⁷ Bouvier, editor Bacon's *Abridgment*, 1st American ed., 111, 242, tit. “Evidence.”

existence or nonexistence of a *law* is a question of fact, it is rarely spoken of as such either by jurists or practitioners.”²⁸ Mr. Justice Livingston says that “Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied. Illustrations and developments of the different parts of this definition: 1. A conviction produced by evidence which ought not, according to the rules of true reason, to have that effect is not a just conviction; the law, therefore, declares what effect different species of evidence ought to have in producing such conviction, and that evidence in its different degrees is called ‘legal evidence.’ . . . 2. The word ‘substantive’ in the definition is intended to exclude all such abstract propositions as can be demonstrated to be true or false by the reasoning power, without having recourse to the establishment of other facts. The propositions intended by the definition are either of fact or of law.”²⁹

According to codes of procedure adopted in several states: “Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.”³⁰ And the law of evidence is the law which has to do with the furnishing of this matter of fact: “1. It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court by one who personally knows the thing to be true, appearing in person, subject to cross-examination; or by allowing it to be given by deposition, taken in such and such a way, and the like. 2. It fixes the qualifications and the privileges of witnesses, and the mode of examining them. 3. And chiefly, it determines, as among probative matters, things which are logically and in their nature evidential, what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence.”³¹ The code definition of the law of evidence is that it is a

²⁸ Best on Evidence, §§ 11, 33.

³⁰ Cal. Code Civ. Proc., § 1823;

²⁹ Mr. Justice Edward Livingston, Draft Code, Book of Definitions (Works, ed. 1872, 11, 646).

Mont. Ann. Code, § 3100; Hill's Ann. Laws (Or.), § 665.

³¹ Thayer, Cas. Ev., p. 2.

collection of general rules established by law: 1. For declaring what is to be taken as true without proof; 2. For declaring the presumptions of law, both those which are disputable, and those which are conclusive; 3. For the production of legal evidence; 4. For the exclusion of whatever is not legal; 5. For determining, in certain cases, the value and effect of evidence.³² Armed with these definitions the lawyer should find little difficulty in keeping his inquiry limited to the scope of legal evidence, and his interpretation of code provisions such as we have given will be guided by the knowledge that judicial evidence can only be construed as the legal means by which the truth of a fact presented in a judicial proceeding is to be ascertained. In order to arrive at the truth, the fact must be presented, but the manner of its presentation must be in strict accord with the lines laid down by the law, so that, properly presented and accepted, the proven truth may be used as legal proof of the proposition in respect to which the evidence was found.

§ 4 (3). The terms "evidence" and "proof."—The recognition of the existence of an unwholesome practice affords no justification for persevering in it, and the indiscriminate use of technical terms such as "evidence" and "proof" is no more tolerable in lawyers than the careless description of scientific terms would be by scientists. What is good enough for the sciolist would not satisfy the scientist, and notwithstanding that the two terms are frequently used in text-books and in judicial decisions as synonymous, we do not hesitate to condemn the practice and urge its abandonment. The terms are often used in such a manner as to include at one time the media by which the facts are established, and at another the effect or conclusions produced by the testimony. It is true the attempt has frequently been made, but without great success, to distinguish between the terms "evidence" and "proof." The latter term in its popular meaning more often refers to the degree or kind of evidence which will

³² Cal. Code Civ. Proc., § 1825.

produce full conviction, or establish the proposition to the satisfaction of the tribunal. More accurately, proof is the effect or result of evidence, while evidence is the medium of proof.³³ To more fully illustrate the meaning of the two terms, if on a charge of arson it were shown that the accused had obtained excessive insurance upon the property burned, that he was in embarrassed circumstances, that he had made contradictory statements as to the circumstances of the fire, and had betrayed great emotion on his first arrest—any one of these circumstances might constitute evidence tending to show his guilt; but all combined might or might not be deemed proof thereof. With the adoption of the codes, there seems a growing desire to keep the definitions at their proper distance, and we find that the majority of the codes define proof as “the effect of evidence, the establishment of a fact by evidence.”³⁴ There is no doubt the statutory definition was adopted by the learned framers of the codes not only to lay down the legal difference between the terms, but in deference to those dicta which have emphatically called for the distinction to be made and observed. Wherever it has been found necessary to differentiate, the judicial utterance has been made with no uncertain sound. “Whenever all of the evidence is of such a character as to convince the intellect and conscience of men of a fact, then that fact is proved. Proof is that degree and quantity of evidence that produces conviction.”³⁵ Proof is logically defined as a sufficient reason for assenting to a proposition;³⁶ as merely that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact.³⁷ “Proof is that quantity of appropriate evidence which produces assurance and certainty. Evidence, therefore, differs from proof as cause

³³ Best, Ev., § 10 et seq.; Powell v. State, 101 Ga. 9, 65 Am. St. Rep. 277, 283, 29 S. E. 309; Jastrzemski v. Marxhausen, 120 Mich. 677, 79 N. W. 935, 937; People v. Beckwith, 108 N. Y. 73, 15 N. E. 53, 55.

³⁴ See Cal. Code Civ. Proc., § 1824.

³⁵ Nevling v. Commonwealth, 98 Pa. 322, 328.

³⁶ Orth v. St. Paul, M. & M. Ry. Co., 47 Minn. 384, 389, 50 N. W. 363, 365.

³⁷ Missouri, K. & T. Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560, 562.

from effect.”³⁸ The words “evidence” and “proof” are often used as synonymous; in strictness, however, the latter is an effect of the former. When a statute requires *proof* to be made, it must be made by *legal evidence*, unless from the context or other qualifying word it is apparent the legislature intended that the fact might be shown by affidavit, or in some other manner.³⁹ The language of the codes is to be traced in “Evidence is the medium of proof; proof is the effect of evidence.”⁴⁰ We find occasionally, but too rarely, direct judicial condemnation of the indiscriminate use of the two words;⁴¹ and authorities are plentiful in which their use interchangeably is deprecated, and the distinction pointed by such unfailing indicators as: “Proof, taken literally is the perfection of evidence.”⁴² “Proof is that which convinces; evidence is that which tends to convince.”⁴³ “Proof is the perfection of evidence, for without evidence there is no proof, though there may be evidence which does not amount to proof.”⁴⁴ In an important case in Georgia,⁴⁵ the court was at some pains to insert in its opinion the digested views of learned jurists. We find: “Proof, in civil process, is a sufficient reason for the truth of a juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another.”⁴⁶ Ayliffe defines “judicial proof” to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner.⁴⁷ In another important case in Georgia⁴⁸ the necessity actually arose for the supreme court to mark the distinction between

³⁸ Wills on Crim. Ev., 2, 3; Greenl. Ev., 1; Jacob's L. Dict., “Proof” and “Evidence.”

³⁹ Buffalo and State Line Railroad Co. v. Reynolds, 6 How. Pr. (N. Y.) 96, 98.

⁴⁰ People v. Beckwith, 108 N. Y. 67, 73, 15 N. E. 53, 55.

⁴¹ Snowden v. State, 62 Miss. 100, 105; Glenn v. State, 64 Miss. 724, 2 South. 109, 110.

⁴² Hill v. Watson, 10 S. C. 268, 273.

⁴³ Jastrzemski v. Marxhausen, *supra*.

⁴⁴ Town of Duaneburg v. Jenkins, 40 Barb. (N. Y.) 574, 584; Schultz v. Plankinton Bank, 40 Ill. App. 462, 469; Best on Presumptions, § 6.

⁴⁵ Powell v. State, 101 Ga. 9, 65 Am. St. Rep. 277, 282, 283, 29 S. E. 309, 317.

⁴⁶ Wharton on Evidence, § 1.

⁴⁷ Ayliffe's Parergon Juris Canonici Anglicani, 442.

⁴⁸ Oliveros v. State, 120 Ga. 237, 1 Ann. Cas. 114, 47 S. E. 627.

the terms. During the progress of a trial for embezzlement, and in order to prove that he had received the money charged to have been embezzled, a receipt signed by the prisoner was tendered in evidence and objected to as not being the highest and best evidence. The trial judge overruled the objection, and said in announcing his opinion as to the admissibility of the evidence: "A receipt showing the delivery of a package is about as high evidence as you can get. It is about as high evidence as one can get that a man has received anything when he acknowledges it in writing." His attention being drawn to what he had said, he subsequently, over the protest of the accused, discharged the jury and declared a mistrial, because of the remarks referred to, deeming them so erroneous as to vitiate any verdict that might be found against the accused. At the following term the accused was put upon his trial upon the same indictment, and pleaded former jeopardy. His plea was overruled and he excepted. The question was thus squarely presented: "Was the trial judge right, under the above-stated facts, in discharging the jury and declaring a mistrial over the protest of the accused?" It was argued that the judge had expressed an opinion in the presence of the jury, and that under the Civil Code of 1895, section 4334, it was a necessity for him to declare a mistrial. That section says: "It is error for any or either of the judges of the superior courts of this state, in any case, whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and should any judge of said court violate the provisions of this section, such violation shall be held by the supreme court to be error, and the decision in such case reversed, and a new trial granted in the court below, with such directions as the said supreme court may lawfully give." It was urged that in making the statement referred to the judge had expressed an opinion as to what had been proved. The court said: "In my opinion, there was not a word or a sentence used by the judge which constituted an expression or intimation to the jury as to

what had been proved in the case. Technically, there is a difference between evidence and proof. Evidence tends to establish or disprove an alleged matter of fact in issue; proof is the effect of evidence, while evidence is merely the means of making proof. A fact is not proved unless it is established. The remarks of the judge did not express or intimate an opinion that any fact had or had not been proved or established. Indeed, the remarks were made about an instrument which had been offered in evidence, but which had not, prior to the judge's remarks, been admitted. If subject to any criticism, it was that the judge expressed an opinion as to the weight of the evidence, and not as to what had been proved," and held that the trial judge had expressed no such opinion of what had been proved as would violate section 4334, and his remarks, therefore, could not be such misconduct on his part as to compel him to grant a mistrial, even if misconduct on his part would authorize such a proceeding. One of the latest authorities⁴⁹ negatively upholds the synonymous character of the terms; and where a statute⁵⁰ provided that no order of dismissal on the grounds of variance between the information and the proof should bar another prosecution for the same offense, the court, holding that proof and evidence were not synonymous, and that the technical distinction had been upheld where both words had been used in the same statute, and citing the cases hereinbefore already noted, nevertheless ruled that the word "proof" as used in the code signified "evidence," and that it was not intended that the state must proceed until evidence became proof before it could declare a variance. With these explanatory authorities and the necessity for accuracy, which is increasing in proportion with the increase of decided cases, no excuse can hereafter be framed for any slipshod use of either of the terms. The fact that writers on and off the bench have carelessly assumed the habit of disregard for words popularly regarded as synonymous may perhaps best be forgotten in a loyal attempt to

⁴⁹ State v. Poole, 64 Wash. 47, 116 Pac. 468. ⁵⁰ Rem. & Bal. Code, § 2316.

keep to the vernacular of accurate legal phraseology for the future. A far stronger reason exists for the mathematical accuracy of legal expression than can be urged to lay euphemists—in their case no one is hurt either by the elegance or the awkwardness of their diction, whereas in the consideration of great legal questions involving important issues and the search for an authorized expression of opinion, diligence is often hampered by the adoption of a dictum containing a faultily worded proposition.

§ 4a. The term “testimony.”—Although the word “testimony” is not used as synonymous with either “proof” or “evidence” to anything like the extent of that in which those two words are unjustifiably interchanged, there are many cases in which they have been confused. Testimony is neither proof nor evidence; it is rather a kind of evidence—that portion which in a trial is presented by witnesses verbally. “Evidence” is the generic term and “testimony” that of the species.⁵¹ The dictionary meaning of the word is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁵² “The statement made by a witness under oath or affirmation.”⁵³ Testimony is a species of evidence by means of witnesses. The broader term “evidence” includes that which is given by witnesses, or offered by documents.⁵⁴ Mr. Justice Campbell (N. Y.) says:⁵⁵ “It may be well to bear in mind that there is a marked difference between testimony and evidence. The latter is much more comprehensive than the former—testimony being the statements or the declarations of a witness, and evidence being rather the result or deduction from all the facts established, whether by testimony, by events or by circumstances, by writings, records or other memorials. It is called evidence, saith Coke, because thereby the point in issue in a cause to be tried is to be made evident to the jury, and

⁵¹ Printing Co. v. Morris, 60 Ind. 153; Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 346.

⁵² Webster.

⁵³ Bouvier, Law. Dict.

⁵⁴ Carroll v. Banker, 43 La. Ann. 1078, 1194, 10 South. 187, 192.

⁵⁵ People v. Kenyon, 5 Park. Cr. (N. Y.) 254, 288.

the evidence to a jury containeth testimony of witnesses and all other proofs to be given and produced to a jury for the finding of any issue joined between parties.”⁵⁶ A charge that “a witness may be impeached by disproving the testimony testified to by him” is not erroneous because of the use of the words “testimony testified to by him” instead of the words “facts testified to by him.” “Testimony,” in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the “facts testified to by him.”⁵⁷ Although the difference between the two words is so well marked in some cases, “testimony” has been held to mean “evidence”;⁵⁸ and a bill of exceptions which purported to contain all the “testimony” has been held in Nebraska and Oregon to be sufficient.⁵⁹ In Indiana and Utah, however, the courts have directly ruled to the contrary, and that the words are not interchangeable.⁶⁰ Notwithstanding the conflict, the use of the right word in the right place is too important a factor in the creation of legal documents to be overlooked by the student, and with the definitions and illustrations above given there should be little doubt in the mind that the three words stand in their order of importance as follows: 1. Proof—the result of evidence. 2. Evidence—the means of proof, subdivided into several species or kinds, one of which is testimonial evidence. 3. Testimony—that kind of evidence which consists of the verbal declarations of a witness.

§ 5 (4). Demonstrative and moral evidence.—Experience has shown that strict mathematical accuracy can only be obtained with regard to that which can be demonstrated with the same exactness and certainty as the problems of

⁵⁶ Jacobs' Law Dict., tit. "Evidence."

⁵⁷ Clark v. State, 5 Ga. App. 605, 63 S. E. 606.

⁵⁸ State v. Winney (N. D.), 128 N. W. 680; Jones v. City of Seattle, 51 Wash. 245, 98 Pac. 743.

⁵⁹ Woolworth v. Parker, 57 Neb. 417, 77 N. W. 1090; Cleveland Oil &

Paint Mfg. Co. v. Norwich Union Fire Ins. Soc., 34 Or. 228, 55 Pac. 435.

⁶⁰ Craggs v. Bohart, 4 Ind. Ter. 443, 69 S. W. 931; Brickley v. Weghorn, 71 Ind. 497; Crooks v. Harmon, 29 Utah, 304, 81 Pac. 95; Carter v. Cummings Nielson Co., 34 Utah, 315, 97 Pac. 334.

Euclid, and that any attempt to make proof the result of mathematical evidence would make the establishment of claim or defense almost a practical impossibility. In judicial procedure the issues are so framed that it is hardly possible to establish with absolute certainty the truth of the propositions involved; hence in courts of justice parties are compelled to rely on evidence which is not demonstrative in the sense indicated, but which for want of a better name is called moral evidence. Greenleaf, one of the greatest authorities on the law of evidence, says: "In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them. The true question, therefore, in trials of fact, is not, whether it is possible the testimony may be false, but whether there is a sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence, are said to be proved."⁶¹ Again: "None but mathematical truth is susceptible of that high degree of evidence, called demonstration, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone; by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained from intuition, or from demonstration."⁶² It is elementary that in civil cases a mere preponderance of the proof is all that is necessary to establish the point in issue, or as the same learned writer puts it: "In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponder-

⁶¹ Greenleaf, *Ev.*, § 1. See *post*,
§ 7 (6).

⁶² *Id.*; *Hopper v. Ashley*, 15 Ala.
457, 467.

ates, and according to the reasonable probability of truth.”⁶³ In criminal actions, however, it is necessary to prove the guilt of the accused beyond a reasonable doubt. In marking this obviously wide distinction, it must be well borne in mind that this degree of proof not only does not call for a mathematical reduction in the shape of a demonstration of guilt, but is often far removed from it. The phrases “proof to a moral certainty” or “proof beyond a reasonable doubt” by no means import any such result. All that they mean is, such proof as shall satisfy the judgment and consciences of the jury, as reasonable men, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.⁶⁴ A reasonable doubt is not to be a mere quibble, an idle doubt created by questioning for the sake of a doubt, nor suggested without some foundation in the evidence. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied.⁶⁵ Perhaps the best definition of reasonable doubt ever promulgated was uttered by Shaw, C. J.⁶⁶ That learned judge said: “Then, what is reasonable doubt? It is a term often used, probably pretty well understood but not easily defined.⁶⁷ It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral cer-

⁶³ Greenleaf, Ev., § 13 (a).

⁶⁴ Commonwealth v. Costley, 118 Mass. 1; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 730; Commonwealth v. Cobb, 14 Gray (Mass.), 57; Commonwealth v. Tuttle, 12 Cush. (Mass.) 502; Regina v. White, 4 Fost. & F. 383.

⁶⁵ Commonwealth v. Costley, 118 Mass. 1, 16.

⁶⁶ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 730.

⁶⁷ In Miles v. United States, *infra*, Mr. Justice Woods says: “Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the mind of the jury.”

tainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.”⁶⁸ This definition is so satisfying and authoritative that later decisions dealing with the phrase are of secondary interest. It is interesting to note, however, the greater facility in defining and the mobility in explaining what reasonable doubt is *not*. It is not a vague, fanciful, or merely possible doubt, but such a substantial doubt as intelligent, reasonable, and impartial jurors may honestly and justly entertain after a careful examination and conscientious consideration of all the evidence.⁶⁹ The law does not mean by reasonable doubt a vague, speculative, or mere possible doubt, but a reasonable, substantial doubt remaining in the minds of the jury after a careful consideration of all the evidence, and such a doubt as reasonable, fair-minded and conscientious men would entertain under all the facts and circumstances of

⁶⁸ In the late *A. C. Freeman's* note to this case he says (52 Am. Dec. 738) that the definition of “reasonable doubt” given in *Commonwealth v. Webster*, *supra*, is approved in *Miles v. United States*, 103 U. S. 312, 26 L. Ed. 481; *Schmidt v. New York etc. Ins. Co.*, 1 Gray (Mass.), 534; *People v. Strong*, 30 Cal. 151, 155; *People v.*

Ashe, 44 Cal. 290. In *People v. Strong*, *supra*, Currey, C. J., says that it is “probably the most satisfactory definition ever given to the words ‘reasonable doubt’ in any case known to criminal jurisprudence.”

⁶⁹ *State v. Mills*, 6 Penne. (Del.) 497, 69 Atl. 841.

the case.⁷⁰ An instruction is not erroneous which defines a reasonable doubt as one arising out of the case, either from the want, weakness, insufficiency, or conflict in testimony, and which leaves the mind of an honest juror wavering and in doubt as to the guilt of the accused, a doubt which is not a mere conjecture, but one for which the jury can assign a reason from having heard the whole case.⁷¹ A reasonable doubt is not every doubt that may flit through the minds of the jury in considering a case, but is a doubt for which the jurors can give a reason if called on to do so. A doubt by any consideration outside the evidence, or doubt born of merciful inclinations, or one prompted by sympathy for the accused is not what is meant by a reasonable doubt.⁷² A reasonable doubt must not be a vague, fanciful or whimsical or even possible doubt.⁷³ A vast number of cases have been decided upon the interpretation of reasonable doubt, but none carry the definition any further than that of Shaw, C. J., above referred to. The variation of definition in those noted hereunder, however, renders them worthy of perusal.⁷⁴ Courts have many times used the words "reasonable doubt" and "morally certain" interchangeably. The writers of legal dictionaries define "moral certainty" to mean that degree of certainty which will justify a jury in grounding on it their verdict.⁷⁵ "Moral certainty" is a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it, a certainty beyond a reason-

⁷⁰ State v. Underhill, 6 Penne. (Del.) 491, 69 Atl. 880.

⁷¹ Jordan v. State, 130 Ga. 406, 60 S. E. 1063; State v. Abbott, 64 W. Va. 411, 62 S. E. 693.

⁷² United States v. Wilson, 176 Fed. 806; State v. Trapp, 56 Or. 588, 109 Pac. 1094.

⁷³ State v. Cole (Del. Gen. Sess.), 78 Atl. 1025; State v. Brown (Del. Sup.), 80 Atl. 146; State v. Honey (Del. Gen. Sess.), 80 Atl. 240.

⁷⁴ Simmons v. State, 158 Ala. 8, 48 South. 606; Monteith v. State, 161 Ala. 18, 49 South. 777; People v. Del. Cerro,

9 Cal. App. 764, 100 Pac. 887; Arnold v. State, 131 Ga. 494, 62 S. E. 806; Governor v. State, 5 Ga. 357, 63 S. E. 241; Brantley v. State, 133 Ga. 264, 65 S. E. 426; People v. Probst, 237 Ill. 390, 86 N. E. 588; State v. Andrews, 77 N. J. L. 108, 71 Atl. 109; Price v. State, 1 Okl. Cr. App. 358, 98 Pac. 447; Reeves v. Territory, 2 Okl. Cr. App. 82, 99 Pac. 1021; Miller v. State, 139 Wis. 57, 119 N. W. 850; United States v. Guthrie, 171 Fed. 528.

⁷⁵ Austin v. State, 6 Ga. App. 211, 64 S. E. 670; Hendrix v. United States, 2 Okl. Cr. App. 240, 101 Pac. 125.

able doubt.⁷⁶ "Moral certainty" is, in the law of criminal evidence, . . . that degree of assurance which induces a man of sound mind to act without doubt upon the conclusion to which it leads.⁷⁷ It is also defined as a high degree of impression of the truth and fact falling short of an absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case.⁷⁸

§ 6 (5). **Direct and circumstantial evidence.**—In the consideration of so wide a subject as the law of evidence, expedience has demanded a severe classification of the various species as they are known by their technical names to lawyers. There are nevertheless more familiar terms by which some of the species are known. Two of the most important divisions are direct evidence and circumstantial evidence, and the latter is also styled indirect evidence in some of the statutes hereinafter referred to, while the former is called as frequently positive evidence as direct evidence. In defining them, it will be found that most of the writers define the one by comparison and contrast with the other, and that form will be adopted here, as the distinction can be better observed by bringing them into juxtaposition. *Direct or positive evidence* is evidence to the precise point in issue; as, in case of homicide, that the witness saw the accused inflict the blow which caused the death, or, in a prosecution for arson, that the witness saw the defendant apply the torch which lighted the fire, or, in the case of an agreement, that the witness was present and witnessed it. *Circumstantial evidence* is that which relates to a series of other facts than the fact in issue, which by experience have been found so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion; for example, when footprints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow since it fell; and from the form and number of the footprints it can be determined whether they are those of a man, a bird or a quadruped.

⁷⁶ Bouvier.

⁷⁸ Burrill, Circ. Ev., § 189.

⁷⁷ Black's Law Dict.

Such evidence, therefore, is founded on experience and observed facts and coincidences establishing a connection between the known and proven facts and the facts sought to be proved.⁷⁹ These two kinds of evidence are thus defined by the codes in several states: "Direct evidence is that which proves the fact in dispute directly without any inference or presumption, and which, if itself true, conclusively establishes the fact. . . . Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. Direct evidence is that which immediately points to the question at issue. Indirect, or circumstantial, evidence is that which only tends to establish the issue in proof of various facts, sustaining, by their consistency, the hypothesis claimed."⁸⁰

§ 6a (5). Direct and circumstantial evidence—Distinction—Advantages and disadvantages.—The distinction, then, between direct and circumstantial evidence is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. That is the fact to be proved; and if any person saw the accused kill the deceased, his testimony becomes direct or positive evidence. But it was early seen that the mere fact that the killing was done in secret was not sufficient to render the crime wholly unsusceptible of proof. In such case it is that circumstantial evidence may be offered; that is, "a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act,

⁷⁹ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 723. See note to State v. Hudson, 66 S. C. 394, 97 Am. St. Rep. 711-802, 44 S. E. 968. As to necessity of instruction as to law on circumstantial evidence, see extended note to 69 L. R.

A. 193-217, and notes to 62 Am. Dec. 179, and 97 Am. St. Rep. 771.

⁸⁰ Cal. Code Civ. Proc., §§ 1831, 1832; Hill's Ann. Laws (Or.), §§ 672, 673; Mont. Ann. Code, §§ 3108, 3109; Ga. Code, § 1009.

in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community destructive of its peace and subversive of its order and security would go wholly undetected and unpunished?"⁸¹ Indeed, it has been many times well put, that strong circumstantial evidence of crimes committed in secret, as happens in the majority of offenses, is the most satisfactory of any to point to the guilt of the accused; "for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous."⁸² The learned Chief Justice Shaw, already referred to, ably summarizes the advantages and disadvantages of each of these modes of proof. With regard to positive evidence, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting this falsehood. With regard to circumstantial evidence, where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts which are so associated with the fact in question, that in the relation of cause and effect they lead to a satisfactory and certain conclusion. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. "The advantages are, that, as the evidence comes from several witnesses and different sources, a chain of cir-

⁸¹ Commonwealth v. Webster, 5 ⁸² East's Pleas of the Crown, c. 5,
Cush. (Mass.) 295, 52 Am. Dec. 711, § 11.
723 et seq.

cumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.”⁸³ Another mode of expressing the distinction between circumstantial and direct evidence is,⁸⁴ that in the first instance the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which, by indirection, logically and rationally demonstrates the *factum probandum*. This is illustrated by proof of recent possession of stolen property. In such a case, resting alone upon such inculpatory evidence, the eye of no witness saw the thief in the act of taking the property stolen. But the witness may testify directly to the fact of seeing the thief, recently after the crime, in possession of the stolen property, and when his possession was challenged, either declined to explain or gave an explanation which was false, from which circumstances of the possession, directly sworn to, and circumstances of a failure to explain or a false explanation, the *factum* of the taking is inferred or deduced by the process of reasoning.

§ 6b (5). **Direct and circumstantial evidence—Further distinctions—Advantages and disadvantages.**—Evidence is of two kinds: that which, if true, directly proves the fact in issue, and that which proves another fact from which the fact in issue may be inferred.⁸⁵

All judicial evidence is either direct or indirect. Direct evidence is that which is applied to the fact to be proved directly, and without the aid of any intervening fact or process. Indirect evidence, or, as it is more commonly

⁸³ *Commonwealth v. Webster, supra.*

⁸⁵ *Hart v. Newland*, 10 N. C. 122.

⁸⁴ *Beason v. State*, 43 Tex. Cr. 442,

67 S. W. 96, 98, 69 L. R. A. 193.

called, circumstantial evidence, is that which is applied to the principal fact indirectly, or through the medium of other facts, by establishing certain circumstances from which the principal fact is deduced by a process of special inference.⁸⁶

“When the existence of any fact is attested by witnesses as having come under the cognizance of their senses, or is stated in documents, the genuineness and veracity of which there seems no reason to question, the evidence of the fact is said to be direct or positive. By circumstantial evidence, on the contrary, is meant that the existence of the principal fact is only inferred from one or more circumstances, which have been established directly.”⁸⁷ Gilpin, C. J., in charging a jury,⁸⁸ thus defines circumstantial evidence: “Circumstantial or presumptive evidence is, where some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having actually occurred. It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed, that is to say, it is taken for granted until the contrary be proved. And this is what is called circumstantial or presumptive evidence.”⁸⁹ Circumstantial evidence is so called because it is composed of circumstances or relative facts, bearing indirectly upon the fact sought to be proved. The probative force of a body of such evidence depends upon considerations of the number, the independence, the weight, and the consistency of these component circumstances. Circumstantial evidence is of two kinds,—certain and uncertain. It is certain when the existence of the fact in dispute is a necessary condition for the existence of the fact attested. It is uncertain when the fact in dispute is a natural effect of the fact attested, but may likewise have been caused by other things.⁹⁰ Direct and circumstantial

⁸⁶ Burrill on Circumstantial Evidence, 4; Best on Presumptions, 12; Wills on Circumstantial Evidence, 16.

⁸⁷ Best on Presumptions, 246.

⁸⁸ State v. Goldsborough, 1 Houst. C. C. (Del.) 302.

⁸⁹ See 1 Crim. Law Mag. 10.

⁹⁰ 1 Greenl. Ev., § 13a; 6 Lond. Law Mag. 373.

evidence are not different in their nature. For, as Wharton says: "All evidence consists of reason and fact co-operating as co-ordinate factors."⁹¹ Circumstantial evidence is merely direct evidence indirectly applied. And direct evidence, when closely analyzed, is found to possess the inferential quality.⁹² Direct and circumstantial evidence are not, therefore, in any sense, opposed to each other. In fact, they are, in practice, found in the most intimate connection with each other. And the very strongest evidence is that in which a body of direct evidence is sustained throughout by numerous according circumstances.⁹³ Direct evidence is very generally admitted to be superior to indirect evidence as a means of judicial proof. And where direct evidence of a fact is obtainable, indirect evidence is regarded as secondary. The superiority of direct over circumstantial evidence arises from the fact that the former always proceeds to the point aimed at by the most direct route, and reaches it by steps involving the least possible mental action, while the latter proceeds circuitously by a succession of steps, each depending on direct proof, and all requiring to be strictly linked together.⁹⁴ It must be admitted that there exists in the minds of many persons a strong prejudice against circumstantial evidence. Frequently persons examined as to their qualifications to serve as jurors, particularly in capital cases, say that they could not conscientiously find an accused party guilty on evidence that is wholly circumstantial. The existence of this feeling is no doubt due to a large extent to the strenuous exertions made by counsel for the accused, in almost every case where the proof of guilt depends upon circumstantial evidence, to throw discredit upon this species of evidence. But there is no doubt another reason, which is thus stated by a writer on the subject:⁹⁵ "The chief error with regard

⁹¹ 1 Crim. Law Mag. 10; Wills on Circumstantial Evidence, 16.

⁹² Burrill on Circumstantial Evidence, 231.

⁹³ Wills on Circumstantial Evidence, 32; Burrill on Circumstantial Evidence, 229.

⁹⁴ Burrill on Circumstantial Evidence, 224; Wills on Circumstantial Evidence, 32; 3 Bentham on Judicial Evidence, 249.

⁹⁵ Lond. Law Mag., vol. 6, p. 368.

to the delusiveness of circumstantial evidence lies in considering it as a mode of reasoning, or proving doubtful points peculiar to a court of justice; whereas it is nothing else than the common course of settling all questions which can be settled by argument, employed, whether knowingly or unknowingly, by all mankind. Objections to proof by circumstantial evidence must equally apply to all reasoning whatever. If a fact cannot be proved directly, that is, by the evidence of one who had cognizance of it through his senses, it must be established by way of inference or reasoning; in other words, by circumstantial evidence." If men would stop to consider the fact that in the ordinary affairs of every-day life they are continually forming judgments on circumstantial evidence alone, and acting upon these judgments in matters of the utmost concern to them, they would be less likely to decry this kind of evidence when acted upon in the administration of justice. The courts have, however, very rarely shared in or encouraged this popular prejudice against circumstantial evidence. In a legal sense, presumptive evidence is not regarded as inferior to direct evidence.⁹⁶ The two are parts of one system of means, intended to aid, and not to thwart, each other.⁹⁷ Circumstantial evidence is often used as an aid to, and frequently as a test of, direct evidence.⁹⁸ It is admissible in both civil and criminal cases in the absence of direct evidence, and is often the only means by which a fact can be proved. This is particularly the case in criminal trials where the act to be proved has been done in secrecy. If circumstantial evidence were to be excluded in cases of a criminal nature, the great majority of criminals would go unwhipped of justice.⁹⁹ "Circumstantial or presumptive evidence is receivable in both civil and criminal cases. The affairs and business of the world could not well be carried on without recognizing the admissibility of

⁹⁶ Best on Presumptions, 35.

⁹⁷ Burrill on Circumstantial Evidence, 224.

⁹⁸ Id. 226.

⁹⁹ Burrill on Circumstantial Evidence, 117; *Rex v. Burdett*, 4 Barn. &

Ald. 95, 106 Eng. Reprint, 873; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *People v. Videto*, 1 Park. Cr. (N. Y.) 603; *State v. Goldsborough*, 1 Houst. C. C. (Del.) 314.

this description of evidence. In criminal matters the necessity of admitting it is indeed much more manifest than in civil matters. Crime usually seeks secrecy; and the possibility of proving the offense charged by direct or positive evidence is much more rare and difficult in criminal cases than in civil cases." Circumstantial evidence may be, and often is, as strong and as conclusive as direct and positive evidence.¹⁰⁰ And it is not error to charge a jury that there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence, where this statement is accompanied by proper explanations, and the jury is at the same time charged that they must from the evidence be convinced to a moral certainty, and beyond a reasonable doubt, that the defendant committed the act charged against him.¹ But while some have erred in too much distrusting circumstantial evidence, it is equally true that others have erred in overestimating the conclusiveness and reliability of that species of evidence. The error on this side of the question has found expression in the statement that circumstances cannot lie. In one sense this is true. But we must bear in mind that while circumstances in themselves cannot lie, those who recount them can and often do lie; and frequently facts themselves may be made to lie, that is, to present a false appearance, and therefore lead to a false conclusion.²

§ 6c (5). Direct and circumstantial evidence—Further distinctions—Advantages and disadvantages.—It is apparent from what has been already said that both direct and indirect evidence have their advantages and drawbacks. Chief Justice Shaw, as we have shown, sets forth very clearly the advantages and disadvantages of each species of evidence.³ Some of the advantages of circumstantial evidence are also thus forcibly set forth by Walworth, J., in delivering a charge to a jury:⁴ "In most cases of conviction upon presumptive proof or circumstantial evidence,

¹⁰⁰ *Law v. State*, 33 Tex. 37.

¹ *People v. Morrow*, 60 Cal. 142.

² *Best on Presumptions*, 253; *Bur-*
rill on Circumstantial Evidence, 234.

³ *Commonwealth v. Webster*, 5
Cush. (Mass.) 295, 52 Am. Dec. 724.

⁴ *People v. Videto*, 1 Park. Cr. (N.
Y.) 603, 605.

there are many different witnesses swearing to several distinct circumstances, all tending to the same result, each of which circumstances is a necessary link in the chain of evidence required to produce a conviction of the accused; and there is therefore the less danger of perjury in such cases in consequence of the number of perjured witnesses which it would be necessary for the prosecution to produce to effect an unjust conviction. For if one perjured witness should swear to a fact forming only one link in a chain of circumstances, the rest of the witnesses being honest, he will be in danger of detection from the discrepancy between his testimony and theirs; when he might have sworn positively, but falsely, to the commission of the crime by the accused, without the possibility of being contradicted. For this reason, although from the imperfection and uncertainty which must ever exist in all human tribunals, I have no doubt that there have been cases in which innocent persons have been convicted on presumptive proofs, yet from my knowledge of criminal jurisprudence, both from reading and observation, I have no hesitation in expressing the opinion that where there has been one unjust conviction upon circumstantial evidence alone, there have been three innocent persons condemned upon the positive testimony of perjured witnesses.”⁵ But while circumstantial evidence is admissible in civil cases, it is in the character of a means of detecting and punishing crime that it assumes its greatest importance.⁶ Indeed, it often happens that in prosecutions for the worst species of crimes this evidence is the most satisfactory and convincing that can be produced.⁷ The fact, already adverted to, that crime is generally committed in secret, where there is no witness present who can testify directly to its commission, renders it absolutely necessary to resort to circumstantial evidence for the purpose of proving the guilt of the accused. To ex-

⁵ See, also, Best on Presumptions, 254; Burrill on Circumstantial Evidence, 227; 1 Stark. Ev. 527; 3 Bentham on Judicial Evidence, 251.

⁶ Burrill on Circumstantial Evidence, 116.

⁷ People v. Videto, 1 Park. Cr. (N. Y.) 603; The Robert Edwards, 6 Wheat. (U. S.) 187, 5 L. Ed. 238; Best on Presumptions, 245.

clude such evidence would be to allow a large part of the crimes committed to remain unpunished.⁸

§ 6d (5). **Direct and circumstantial evidence—Further distinctions — Advantages and disadvantages.**—From the illustrations given, there is little room for doubt or confusion either as to the meaning of the terms or such advantages as may flow from the adoption of either form of evidence. We cannot, however, leave the contrast, well marked as it is by authority, without referring to a famous opinion of Gibson, C. J., of Pennsylvania, dealing with the suggestion that as the evidence against a prisoner was only circumstantial, it was consequently entitled to a very inferior degree of credit, if to any credit at all. The learned judge said: "Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. . . . The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam engine. Innocent men have doubt-

⁸ From one of the late A. C. Freeman's excellent monographic notes appended to the case of *Ripley v. Miller*, 1 Jones (N. C.), 479, 62 Am. Dec. 177. See, also, *West v. State*, 76 Ala. 98;

McCann v. State, 13 Smedes & M. (Miss.) 471; *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *Pease v. Smith*, 61 N. Y. 477; *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777. .

less been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual, and not technical, disbelief, for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offenses capital. The wonder is, that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is legal evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence."⁹

§ 6e (5). Circumstantial evidence — Relation to testimonial evidence.—The proposition that one inference cannot be founded on or drawn from another inference rests on ample authority.¹⁰ It must be received, however, with certain qualifications. One eminent legal author in calling it a fallacy says¹¹ that it had been once suggested that a fact desired to be used circumstantially must itself be established by testimonial evidence. "There is no such rule; nor can be. If there were, hardly a single trial could

⁹ Commonwealth v. Harman, 4 Pa. 269, 271.

¹⁰ 1 Starkie, Evidence, 57; Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E.

563; Binns v. State, 66 Ind. 428; United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Manning v. Insurance Co., 100 U. S. 693, 25 L. Ed. 761.

¹¹ Wigmore on Evidence, § 41.

be adequately prosecuted.¹² For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it, and from this we infer that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that the fatal stab was the result of his design. In these and innumerable daily instances we build up inference upon inference, and yet no court ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as only valid for the particular evidentiary facts therein ruled upon." McCabe, J., of the supreme court of Indiana, in a case of murder sought to be established by circumstantial evidence, said:¹³ "This process of tallying and confirming each circumstance by the others does not infringe the general rule that one inference cannot be based on another. There is an important exception to that rule, however. A fact in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference have the required basis of a proved fact.¹⁴ In short, it is not merely the sum of the simple probabilities created by the numerous individual circumstances pointing to and indicating the absence of burglars and all other human beings than appellant and his wife at the scene of the murder, but it is the compound ratio of them all, tallying with and confirming each other, that made them all strong enough, when considered together, to fully justify the jury in believing and finding that no burglars, and no other human beings than appellant and his wife, were present when she was shot; from which they had a right to conclude, to a moral certainty,

¹² Abbott, C. J., in *Rex v. Burdett*, 4 Barn. & Ald. 95, 161, 106 Eng. Reprint, 873: "If no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment."

¹³ *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 158.

¹⁴ Burrill, *Cire. Ev.*, p. 138; Best. Pres., § 187; Greenleaf, *Ev.*, § 34.

that appellant committed the murder." We think the expression used in stigmatizing the rule as a fallacy is too broad. The safer method of utilizing it is, in its present form, subject to the exception aptly alluded to by McCabe, J., in the Indiana case.

§ 7 (6). Competent and satisfactory (or sufficient) evidence.—Another distinction constantly recognized by the courts is that between *competent* and *satisfactory* evidence, and is thus stated and explained by Professor Greenleaf: "By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect; the former being exclusively within the province of the court; the latter belonging exclusively to the jury."¹⁵ The statutory definition is founded on Greenleaf and contains also other terms. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."¹⁶ "Competent evidence is that which is admissible. Sufficient evidence is that which is satisfactory for the purpose."¹⁷ Although there appears to have been

¹⁵ Greenl. Ev., § 2.

N. Y. Supp. 507, 18 Misc. Rep. 213; Horbach v. State, 43 Tex. 242, 249.

¹⁶ Cal. Code Civ. Proc., § 1835; Chapman v. McAdams, 69 Tenn. (1 Lea) 500, 504; Porter v. Valentine, 41

¹⁷ Ga. Code, § 1009; Ryan v. Town of Bristol, 63 Conn. 26, 27 Atl. 309,

raised questions as to the use of the term "satisfactory," they appear to be rather academic than substantive and rather as strengthening the validity of Greenleaf's definition by the very fact of testing it. A perusal of the many cases touching incidentally on the definition will disclose only that the discussions have arisen more from the want of uniformity in using one term than in the nonapplicability of the terms used, having regard to their synonymy.¹⁸ In determining whether evidence is competent¹⁹ reference must be had to those excluding principles which form so large a part of the law of evidence, and it is clear that the application of those rules of law which restrain the admission of evidence can be safely intrusted only to those familiar with legal science. Although the sufficiency of the evidence is ordinarily for the determination of the jury, it will be seen that in determining the amount of testimony to be received and the mode of its presentation, the court is charged with important functions, and vested with no little discretion.²⁰

§ 8 (7). Other descriptive terms—Cumulative evidence.

Cumulative evidence is additional evidence of the same kind to the same point. Thus, when testimony has been given by one or more witnesses as to an assault, and other witnesses are produced who testify to the same state of facts and to no new fact, the evidence given by such wit-

312; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241.

¹⁸ *Snodgrass v. Clark*, 44 Ala. 198; *Carter v. Fulgham*, 134 Ala. 238, 32 South. 684; *People v. Brotherton*, 47 Cal. 388; *Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866; *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. 597; *Callan v. Hanson*, 86 Iowa, 420, 53 N. W. 282; *Thayer v. Boyle*, 30 Me. 475; *French v. Day*, 89 Me. 441, 36 Atl. 909; *Moriarty v. Moriarty*, 108 Mich. 249, 65 N. W. 964; *Kenny v. Hannibal etc. R. Co.*, 70 Mo. 243; *State v. School Dist.*, 55 Neb. 317, 75 N. W. 855; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, 39 L. R.

A. 737, 45 N. E. 6; *Davidson v. Bowden*, 5 Sneed (Tenn.), 129; *Wilcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, 45 S. W. 781; *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638; *Moore v. Stone* (Tex. Civ. App.), 36 S. W. 909; *Knopke v. Germantown etc. Ins. Co.*, 99 Wis. 289, 74 N. W. 795; *Richmond & Co. v. Trammel*, 53 Fed. 196.

¹⁹ See *Ryan v. Town of Bristol*, *supra*; *Niles v. Sprague*, 13 Iowa, 198; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241; *Porter v. Valentine*, *supra*.

²⁰ See §§ 174, 175, *post*, and sections on "Examination of Witnesses."

nesses is merely cumulative.²¹ Although cumulative evidence is admissible, and often of great importance, considerable discretion may be exercised by the trial judge in determining the extent to which such evidence may be received, and in limiting the number of witnesses who may testify to a particular fact.²² The statutory definitions are in accord, for the most part, with that given here, but the definition in the Code of Georgia,²³ "Cumulative evidence is that which is additional to other already obtained," omits the vital point of distinction, namely, "of the same kind," and hence may be interpreted as any addition to the evidence at all. Variations of judicial definitions might be given without number, but the following²⁴ contain references sufficient for our purpose. "Evidence which brings to life some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule."²⁵ "Though on the same point it may yet not be cumulative, but if of the same kind, it is cumulative. Nor can we look to the effect of the new evidence in considering whether it is cumulative. If dissimilar to the previous evidence, it is not cumulative. If similar it is cumulative."²⁶ "If it is of a different kind, though upon the same issue or of the same kind upon a different issue, it is not cumulative."²⁷ "Cumulative evidence does not necessarily include evidence which tends to establish the same ultimate or principally controverted fact."²⁸ Where in a criminal trial the

²¹ *Parker v. Hardy*, 41 Mass. (24 Pick.) 246; *People v. Superior Court*, 10 Wend. (N. Y.) 285, 292, and cases cited. See article "Cumulative Evidence," 3 Ency. of Evidence, 914-948.

²² *Thomp. Trials*, § 353; *Mergenthim v. State*, 107 Ind. 567, 8 N. E. 568; *Hilliard v. Beattie*, 59 N. H. 462; *Sixth Ave. R. Co. v. Metropolitan El. Ry. Co.*, 138 N. Y. 548, 34 N. E. 400, 401. See § 900, *post*, and chapter on "Examination of Witnesses."

²³ Section 1009.

²⁴ Selected from *Words and Phrases*, Ed. Staff Nat. Rep. System, p. 1783 et seq.

²⁵ *Anderson v. State*, 43 Conn. 514, 519, 21 Am. Rep. 669.

²⁶ *Grogan v. Chesapeake & O. Ry. Co.*, 39 W. Va. 415, 421, 19 S. E. 563.

²⁷ *Cooper v. Ellis*, 3 Ind. App. 142, 29 N. E. 444; *State v. De Marias* (S. D.), 130 N. W. 782.

²⁸ *Dale v. State*, 88 Ga. 552, 15 S. E. 287; *Fellows v. State*, 114 Ga. 233, 39 S. E. 885; *Able v. Frazier*, 43 Iowa, 175.

defense was *alibi*, and the accused introduced witnesses who testified that on the day of the commission of the crime they saw the accused in a county other than that in which it was perpetrated, he being on that day, according to the testimony of some of them, at one place in the county to which their testimony related, and according to the testimony of others of them at other places therein, and according to the testimony of all, too far from the scene of the offense to have been possibly present at the time of its perpetration, newly discovered testimony of still another witness, which placed the accused in the county where the other witnesses located him on the day in question at a different hour and place from any testified to by them, is not merely cumulative, though it tended, like the other testimony to establish the truth of the defense of *alibi*.²⁹ If the evidence relates to the same subordinate or specific fact to which proof was before adduced of a like character, it is cumulative, but if to a new fact respecting the general question or point in issue, it is not.³⁰

§ 8a (7). Other descriptive terms — Real evidence.—

There are numerous terms which are frequently used as descriptive of different kinds of evidence which will be frequently referred to in this work or discussed under separate heads. For example, real evidence is that which is addressed to the sense of the tribunal, as where objects are presented for the inspection of the jury.³¹ A learned author styles this class of evidence "Autoptic Proference,"³² and says that the term "real evidence" is not happily applied in this connection, because "real" is an ambiguous term, because the process is not the employment of "evidence"

²⁹ *Fellows v. State, supra.*

³⁰ *Young v. State (Ark.)*, 138 S. W. 475; *Williams v. Territory*, 13 Ariz. 306, 114 Pac. 556; *Waller v. Graves*, 20 Conn. 305; *Saylors v. State (Ga. App.)*, 70 S. E. 975; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *Layman v. Minneapolis St. Ry. Co.*, 66 Minn. 452, 69 N. W. 329; *Williams v. State (Miss.)*, 54 South. 857; *State v.*

Whitsett, 232 Mo. 511, 134 S. W. 555; *People v. Shea*, 16 Misc. Rep. 111, 38 N. Y. Supp. 821; *State v. De Marias (S. D.)*, 130 N. W. 782; *Goldsworthy v. Town of Linden*, 75 Wis. 24, 43 N. W. 656.

³¹ For discussion of this subject, see chapter on "Real Evidence."

³² *Wigmore on Ev.*, §§ 1150-1168.

at all, in the strict sense, and lastly because the inventor of the term, Bentham,³³ used it originally in a different sense. He needs no apology for coining the more scientific name, and points out that Robertson, C. J., used the term "autopsy"³⁴ in reference to similar matters, as the following excerpts illustrate. "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization, the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence, *autopsy*, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact. . . . [Jurors] when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. . . . Hence the policy of having a jury of the vicinage; and hence, too, jurors have not only been permitted but required to decide on *autoptical* examination wherever it was practical or convenient." While the term is not directly used in the code systems, it is covered in the description contained in the last of the four kinds of evidence, namely, "other material objects presented to the senses."³⁵ Another philosophical writer³⁶ deals with the term "real evidence" as opposed to personal evidence, making the distinction that the latter refers only to evidence furnished by a human being and real evidence furnished by a thing. On the whole, the discussion does not call for serious consideration by jurists who may use either of the terms with perfect safety. "Real evidence" has nevertheless been more frequently used, and is, on the whole, preferable. Occasionally it is to be found under the name of "immediate" evidence. Best, speak-

³³ Judicial Evidence, III, 26ff.

³⁵ Cal. Code Civ. Proc., § 1827.

³⁴ In *Gentry v. McGinnis*, 3 Dana (Ky.), 382, 386.

³⁶ Gulson, *Philosophy of Proof*.

ing of this species of evidence, denominates it "real" evidence, and says: "Immediate evidence is where the source of the evidence is present to the senses of the tribunal. This is of all proof the most satisfactory and convincing."³⁷

§ 8b (7). **Other descriptive terms—Corroborative evidence.**—The statutory definition is that corroborative evidence is additional evidence of a different character, to the same point.³⁸ Underhill defines it as additional evidence proving similar facts or facts calculated to produce the same results as facts already given in evidence.³⁹ The distinction between corroborative and cumulative evidence is clearly marked, although, ordinarily, corroborative evidence simply means fortifying evidence, whether it is evidence of different or similar facts, or additional evidence of the same fact.⁴⁰ Questions as to such evidence frequently arise under statutory enactments mostly relating to offenses calling for corroborative evidence, and in civil cases in applications for new trials in cases of newly discovered evidence, when the court may be called upon to decide whether the evidence is cumulative or corroborative.⁴¹

§ 8c (7). **Other descriptive terms—Primary or best evidence and secondary evidence.**—Primary or best evidence is that which affords the greatest certainty of the fact in question; thus, a deed or other written instrument is primary evidence of its contents.⁴² Secondary evidence is that

³⁷ 1 Best Ev. (Morgan's edition), 307. See, also, Whart. Crim. Ev., § 312; Hale, P. C. 633, where a notable instance is given of its force; 1 Taylor, Ev., § 512; Abb. Tr. Ev., 599; Trial by Inspection, by Judge Thomson, 25 Cent. Law J. 3; Profert of the Person, by Henry Wade Rogers, 15 Cent. Law J. 2; Thurman v. Bertram, 20 Alb. Law J. 151; Springer v. City of Chicago, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514; Car Co. v. Parker, 100 Ind. 181; Louisville etc. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Schroeder v. Railroad Co., 47 Iowa, 375; State v. Wieners, 66

Mo. 29; Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600; Mulhade v. Railroad Co., 30 N. Y. 370; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493.

³⁸ Cal. Code Civ. Proc., § 1839; Ann. Codes & St. Or. 1901, § 692.

³⁹ Underhill on Ev., 3.

⁴⁰ Am. & Eng. Ency. of Law, tit. "Corroborative Evidence"; Gildersleeve v. Atkinson, 6 N. M. 250, 27 Pac. 477.

⁴¹ Westbrook v. Aultman etc. Co., 3 Ind. App. 83, 28 N. E. 1011; Hilliard v. Beattie, 59 N. H. 462.

⁴² See § 200 et seq., *post*; Cal. Code Civ. Proc., § 1829.

which is inferior to primary evidence, and which upon its face shows that better evidence exists; thus, a copy of a written instrument or the recollection of a witness as to its contents.⁴³ Like other terms used in describing kinds of evidence, it will be found easier to read definitions of primary and secondary evidence together. The rule is elementary which requires the production of the best evidence of which the case, in its nature, is susceptible. The rule does not demand the greatest amount of evidence which can be given on the litigated fact; but its design is to prevent the introduction of any, where, from the nature of the case, the law presumes, or the proof shows, that better evidence is in the possession, or under the control, of the party. The object of the rule which requires the best evidence of which, in its nature, the case is susceptible, is the prevention of fraud. Where the law raises the presumption, or where the proof shows, that the party has in his possession, or under his control, better evidence, it is fair to presume that the party withholds it from some sinister motive, and that, if produced, his design would be thwarted. The reason of the rule is to insure the pure administration of justice. This rule forbids the introduction of secondary evidence so long as the original and primary evidence can be had. The rule only excludes that evidence which indicates the existence of more original sources of information. That evidence which presupposes the existence of better in the possession or under the control of the party is usually designated by judges and law-writers as secondary evidence. The distinction between original or primary and secondary evidence is one of law. The law excludes the secondary evidence until the loss or nonexistence of the primary evidence is shown. The rule relates to the quality, and not to the strength, of the evidence. The term "best evidence" is confined to cases where there exists, or is presumed to exist, primary as well as secondary evidence. It means only that, if the best evidence in existence is not capable of production, the next best shall be admitted. If admissible, the secondary evidence might be

⁴³ See § 200 et seq., *post*; Cal. Code Civ. Proc., § 1830.

as cogent and influential with a court or jury as the original or primary evidence would have been.⁴⁴ "But where there is no substitution of evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed."⁴⁵ "Sometimes the rule has been misunderstood, as implying that the law requires, in every case, the most convincing or credible evidence which could be produced, under the circumstances. But all the authorities agree that this is not its meaning."⁴⁶ "It is the offering of evidence which, in the nature of things, presupposes the existence of better evidence, which is not offered, that is ground for cautionary mention by the court, and legitimate subject for the comments of counsel, and which affects the weight of that evidence offered."⁴⁷

§ 8d (7). Other descriptive terms—Conclusive evidence. When evidence is received which the law does not allow to be contradicted, it is said to be conclusive. Thus the record of a court of competent jurisdiction cannot be contradicted by the parties to such record.⁴⁸ It means evidence which is incontrovertible.⁴⁹ It means either a presumption of law or else evidence so strong as to overbear all other in the case to the contrary.⁵⁰ Conclusive proof means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to

⁴⁴ From the United States Sugar Refinery v. E. P. Allis Co., 56 Fed. 786, 9 U. S. App. 550, 6 C. C. A. 121, we have extracted this authoritative dissertation, which embodies the law defining the distinction between the two classes of evidence. See, also, Wittick's Admr. v. Keiffer, 31 Ala. 199; Georgia Pac. R. Co. v. Strickland, 80 Ga. 776, 12 Am. St. Rep. 282, 6 S. E. 27; Coffing v. Carnahan, 122 Ind. 427, 23 N. E. 855; State v. McDonald, 65 Me. 466; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Dillon v. Howe, 98 Mich. 168, 57 N. W. 102; Jelks v. Barrett, 52 Miss. 315; Manhattan Malting Co. v. Sweteland, 14

Mont. 269, 36 Pac. 84; Gray v. Pentland, 2 Serg. & R. (Pa.) 23; Scott v. State, 3 Tex. App. 103; United States v. Reyburn, 6 Pet. (U. S.) 352, 8 L. Ed. 424; The Ulalia v. United States, 37 Ct. of Cl. 466.

⁴⁵ 1 Greenl. Ev., § 82, and cases.

⁴⁶ Best, Ev. (Chamb.) 80.

⁴⁷ Id. 78; 1 Tayl. Ev., § 363.

⁴⁸ See § 585 et seq., *post*; Cal. Code Civ. Proc., § 1837; Ann. Codes & St. Or. 1901, § 690.

⁴⁹ Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

⁵⁰ Haupt v. Pohlmann, 24 N. Y. Super. Ct. 121.

regard some fact as proved, and to exclude evidence intended to disprove it.⁵¹ Conclusive in law is "that of which from its nature the law allows no contradiction or explanation, an inference which the law makes as peremptory that it will not allow it to be overthrown by any contrary proof, however strong."⁵² It means possessing weight and force that cannot be contradicted;⁵³ evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue.⁵⁴

§ 8e (7). Other descriptive terms—*Prima facie* evidence.—*Prima facie* evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed. It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.⁵⁵ *Prima facie* evidence is that which, being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be credited by the jury, unless rebutted or the contrary proved.⁵⁶ In citing Starkie's definition given above, Parker, J., says that *prima facie* evidence is an inference or presumption of law, affirmative or negative of a fact, in the absence of proof; or until proof can be obtained or produced to overcome the inference; and that it is the weakest of all evidence upon which legal action can be sustained, and ceases to be sufficient when rebutted or impaired by contrary and better proof.⁵⁷ It is evidence, however, which, standing alone and unexplained,

⁵¹ Stephen's Dig. of Ev., art. 1.

⁵² Webster's Dict.

⁵³ Hoadley v. Hammond, 63 Iowa, 599, 19 N. W. 794.

⁵⁴ Bouvier, Law Dict.

⁵⁵ Crane v. Morris, 6 Pet. (U. S.) 598, 611, 8 L. Ed. 514; Kelly v. Jackson, 6 Pet. (U. S.) 622, 632, 8 L. Ed. 523; United States v. Wiggins, 14 Pet. (U. S.) 334, 10 L. Ed. 481; Lillienthal's Tobacco v. United States, 97 U. S. 237, 268, 24 L. Ed 901, 905;

Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Emmons v. Westfield Bank, 97 Mass. 230, 243; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329, 13 L. R. A. 59, 16 S. W. 881; State v. Roten, 86 N. C. 701; Meadors v. Johnson, 27 Okl. 544, 112 Pac. 1121.

⁵⁶ 1 Starkie, Ev. 479; Smith v. Gardner, 36 Neb. 741, 55 N. W. 245.

⁵⁷ People v. Thacher, 1 Thomp. & C. (N. Y.) 158, 168.

will maintain the proposition and warrant the conclusion to support which it was introduced.⁵⁸ The statutory definition is that it is evidence "which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example, the certificate of a recording officer is *prima facie* evidence of a record, but it may afterwards be rejected upon proof that there is no such record."⁵⁹ And, by statutes, account-books, complying with the requisite formalities, are *prima facie* evidence of the sale and delivery of goods;⁶⁰ and records and certified copies made by public officers may be *prima facie* evidence of the contents of the original documents.⁶¹

§ 8f (7). Other descriptive terms—Partial evidence—Indispensable evidence.—These terms find the following statutory definitions: "Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the fact in dispute."⁶² Evidence without which a particular fact cannot be proved is called indispensable evidence.⁶³

§ 8g (7). Other descriptive terms—Hearsay evidence—Newly discovered evidence—Rebutting evidence.—Of these terms hearsay evidence⁶⁴ and rebutting evidence⁶⁵ are defined in their appropriate places. By newly discovered evidence is meant proof of some new and material fact in the case, which has come to light since the verdict. If a case has gone against a party simply because a portion of

⁵⁸ State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

⁵⁹ Cal. Code Civ. Proc., § 1833; Moore v. Hopkins, 83 Cal. 270, 17 Am. St. Rep. 248, 23 Pac. 318.

⁶⁰ See § 567, et seq., *post*.

⁶¹ See §§ 525, 544, *post*.

⁶² Cal. Code Civ. Proc., § 1834; Ann. Codes & Stats. Or. 1901, § 687.

⁶³ Cal. Code Civ. Proc., § 1836; Ann. Codes & Stats. Or. 1901, § 689.

⁶⁴ See *post*, c. 10.

⁶⁵ See § 809, *post*.

his evidence, without any fault of his, has remained latent, so that the truth has been obscured, what is more evident than that the truth ought to be vindicated by a second trial? It would be as wrong to permit, under such circumstances, the successful party to enjoy his advantage, obtained not upon his own strength, but upon the weakness of his opponent, as to permit the latter to suffer without redress.⁶⁶ From the foregoing it will readily be seen that questions of newly discovered evidence are almost invariably connected with new trials, in which relation the subject is hereinafter considered. In addition to those enumerated, there are casual terms of description, often thoughtlessly and hence inaccurately applied, and it is thought prudent to limit our definitions to those which are of common use, and in respect to which the student has not the technical signification always ready at hand.

⁶⁶ Grah. & W. New Trials, cited in *In re McManus*, 35 Misc. Rep. 678, 72 N. Y. Supp. 409.

CHAPTER 2.

PRESUMPTIONS.

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§ 9 (8). **Presumptions—Definitions.**—When we set out to define a word like “presumption,” as used in the law of evidence, we are weighted with the responsibility not only of furnishing kaleidoscopic definitions of the term so frequently used, but also by the knowledge that the word so used is frequently the wrong word. Presumption, assumption and inference are indiscriminately made use of. To attempt to coin a new word would be to throw out of gear the machinery of a host of text-books and a myriad of judicial decisions. We must therefore take the word as we find it. We do not wish to be the last to lay the old aside nor yet the first to try a new one, but draw attention to what is the result partly of conservatism on the part of the lawyers in declining to change their familiar words and phrases as the cases decided have outgrown their technical use, and partly of the policy of *laissez-faire*, which is responsible for so many legal solecisms and barbarisms. Until the right words are used in the right places and the wrong ones dropped altogether, we can only hope to do the best with the material at hand, although the difficulties are increased when it becomes necessary to point the distinction between terms, one of them being used in questionable connotation. The ordinary dictionary meaning will at once convey this. We find presumption defined:

1. As the act of forming a judgment on probable grounds

and subject to confirmation or invalidation by further evidence, also, the judgment so formed; 2. A ground for such judgment; an argument carrying weight, but leaving the question in doubt; as, the strong presumption is that what you say is true; 3. That which may be logically assumed to be true until disproved; a position warranted by past experience or by the facts as far as known, but capable of being doubted or refuted; 4. The inference of a fact or proof of circumstance that usually or necessarily attends such fact.¹ A presumption may be defined to be an inference as to the existence of one fact from the experience of some other fact founded upon a previous experience of their connection.² Statutory definitions are that "a presumption is a deduction which the law expressly directs to be made from particular facts," whereas an inference is "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." "Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown."³

Blackstone, in speaking of the nature of evidence required, says:⁴ "Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take its place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either necessarily or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved." The United States supreme court has given us another form of the definition. "A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known."⁵ A presumption is a probable inference,

¹ Standard Dictionary.

² Starkie, Ev., p. 742.

³ Cal. Code Civ. Proc., §§ 1958, 1959; Lord's Oregon Laws, §§ 794, 795; Fisher v. McInerny, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907;

Cronan v. New Orleans, 16 La. Ann. 374, citing Civ. Code, §§ 2263, 2267.

⁴ 2 Cooley's Blackstone, 1132.

⁵ Home Ins. Co. v. Weide, 11 Wall. (U. S.) 438, 20 L. Ed. 197. See, also, Hilton v. Bender, 69 N.

which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidences of facts and circumstances with each other. When a fact shown in evidence *necessarily* accompanies the fact in issue, it gives rise to a strong presumption as to the existence of the fact to be proved. If the fact in evidence *usually* accompanies the fact in issue, it gives rise to a probable presumption of the existence of the fact to be proved. If the fact shown in evidence only *occasionally* accompanies the fact in issue, it gives rise only to a slight and insufficient presumption; but even this fact may, in connection with other relevant and consistent facts and circumstances, constitute an element in circumstantial evidence.⁶ A presumption has been defined to be "a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved."⁷ A presumption is a probable inference, which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty.⁸ A presumption, in the proper and technical sense of the word, is much more limited in its nature than presumptive or circumstantial evidence. A

Y. 75; Chesley v. Brown, 11 Me. 143; Patterson v. McCausland, 3 Bland (Md.), 69.

⁶ United States v. Searcey, 26 Fed. 435, 437. Other definitions are to be found in Conway v. Supreme Council Catholic Knights of America, 137 Cal. 384, 70 Pac. 223; Doane v. Glenn, 1 Colo. 495; Fay v. Reynolds, 60 Conn. 217, 21 Atl. 418; Allison v. State, 42 Ind. 354; Lane v. Missouri Pac. Ry. Co., 132 Mo. 4, 33 S. W. 645, 1128; Snediker v. Everingham, 27 N. J. L. (3 Dutch.) 143; Jackson v. Warford, 7 Wend. (N. Y.) 62; Hilton v. Bender, 69 N. Y. 75; Johnson v. Territory, 5 Okl.

695, 50 Pac. 90; Bernhardt v. Western Pennsylvania R. Co., 159 Pa. 360, 28 Atl. 140; Pell v. Ball's Exrs., Cheves Eq. (S. C.) 99; State v. Heaton, 23 W. Va. 773; Welch v. Sackett, 12 Wis. 243; United States v. Sykes, 58 Fed. 1000. See the late cases: Cleveland etc. R. Co. v. Lynn (Ind.), 98 N. E. 67; Hartwell v. Parks, 240 Mo. 537, 144 S. W. 793; Leask v. Hoagland, 205 N. Y. 171, 98 N. E. 395.

⁷ Stephen's Digest, c. 1, art. 1; Ulrich v. Ulrich, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

⁸ 1 Phil. Ev. 156.

presumption, strictly speaking, results from a previous known and ascertained connection between the presumed fact and the fact from which the inference is made, without the intervention of any act of reason in the individual instance; on the other hand, circumstantial evidence, that is, indirect evidence to prove a fact, may depend wholly on a process of reasoning, applied to the facts of a particular case, although the mind may never have experienced such a combination before.⁹ A presumption is, in its characteristic feature, a rule of law laid down by the judge, and attaching to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequences attached to it.¹⁰ Presumptions are called the intendments of law. They are in pursuance of the allowed principles or permissions of the established law, but cannot be permitted when they are in hostility to them.¹¹ Thayer deals with the subject in his own masterly way. From his treatise¹² we extract that "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. When the term is legitimately applied, it designates a rule or a proposition which still leaves open to further inquiry the matter thus assumed. The exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate the duty of going forward, in argument or evidence, on the particular point to which they relate. They are thus closely related to the

⁹ 4 Starkie, Ev. 1246; State v. Tibbets, 35 Me. 81, 83.

¹⁰ Wigmore, Ev., § 2491.

¹¹ Vinyard v. Passalaigue, 2 Strob. L. (S. C.) 536.

¹² Thayer, Prel. Treat. Ev. 314-346.

subject of judicial notice; for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine. Presumptions are not themselves either argument or evidence, although for the time being they accomplish the result of both." Further on he says that presumption, assumption or "taking for granted" are interchangeable names for an act or process which aids and shortens inquiry and argument. These recognitions which, as Thayer says, go to make up the doctrine are treated also by Blackburn, who calls them rules of construction, "that is to say, rules of the substantive law designed to aid in interpreting words and conduct."¹³ A presumption is not generally regarded as evidence to be placed in the balance and weighed, but rather as a rule of law as to which party shall first proceed and go forward with the evidence to prove an issue.¹⁴ Instances of its being so regarded, however, are extant. The statutes of Utah¹⁵ provide that the court in charging the jury may state the testimony and declare the law, and inform them that they are the sole judges of the credibility of the witnesses, and of the weight of the evidence, and of the facts. It was held¹⁶ that the term "testimony," as used in the statutes, was equivalent to the term "evidence"; and that a presumption, though slight, if relevant, is a species of evidence, and may be stated by the court in the charge in accordance with the provision of the statute. Presumptions nevertheless, as we have shown, are in themselves neither evidence nor argument; although for the time being they accomplish the result of both. It would be as true, and no more so, to say that an instance of judicial notice is evidence as to say that a presumption

¹³ Blackburn on Sales, 1st ed., 151-154. "A rule of construction may always be reduced to the following form: Certain words and expressions which may mean either X or Y shall *prima facie* be taken to mean X. A rule of construction always contains the saving clause: 'Unless a contrary intention appear' . . . though some rules are

much stronger than others and require a greater force of intention in the context to control them." Hawkins, Wills, Preface; Thayer, Cases on Ev., 2d ed., 39.

¹⁴ Rock Island Plow Co. v. Balderston, 26 S. D. 399, 128 N. W. 482.

¹⁵ Laws Utah 1884, § 30, p. 125.

¹⁶ United States v. Clark, 5 Utah, 226, 14 Pac. 288.

is evidence. These terms relate to the whole field of argument, whenever and by whomsoever conducted; and to the whole field of the law, in so far as it has been shaped or is being shaped by processes of reasoning.¹⁷

§ 9a (8). Presumptions and inferences—Distinctions.—There seems no excuse for regarding presumption and inference as synonymous. As we have shown, some of the code states define both terms; and, briefly, the difference is, that a presumption is a mandatory deduction, while an inference is a permissible deduction which the reason of the jury makes without an express direction of law to that effect. The distinction was well marked by Walker, J., of the supreme court of North Carolina. He said¹⁸ in the case then under consideration the court was requested to charge that there was a presumption that the deceased had exercised care, which the court refused to give, but charged the jury that there was an inference that due care was exercised. "It is undoubtedly true that the law raises a presumption of care, and the party against whom it is raised must overcome it by proof of facts inconsistent with the fact presumed. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury. When the court refused to give the instruction as plaintiff requested it to be given, and substituted that which was given, the jury might well have inferred that the court was of the opinion that the prayer for instruction was too strongly

¹⁷ Thayer, Cases on Ev. 38.

¹⁸ Cogdell v. Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618.

worded, and that the inference was to be drawn by them, and that it was not obligatory upon them to infer the fact of care on the part of the intestate." In two other cases in that state the distinction has been made. Malice may in some cases be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should not have been left to them.¹⁹ In the other case, the court equally recognized the legal difference between the words. The court had charged the jury that if a notice was correctly addressed and deposited in the post-office, the law presumes that it was received, and therefore had been duly served; but afterward the court left it to the jury to decide, as an open question of fact, or as an inference to be drawn from the evidence, whether the notice had been served or not. The supreme court held that it was error to have thus weakened the force of the presumption; in other words, to have substituted the permissive inference from the evidence by the jury for the compelling force of the un rebutted presumption.²⁰ Whatever confusion has arisen in the past between the terms, the distinction is now so plainly written that it seems almost supererogatory to refer to it. It is, however, only by persistent reference that we can hope to impress legal writers with the paramount importance of absolute correctness in the use of technical terms, so that the reader has not to question their appropriate application to the context. Inasmuch as a presumption is the deduction which the law expressly directs to be made from *particular* facts, and an inference is a deduction which may be made from *any* facts legally proved (provided that that inference is founded on such a deduction from a fact legally proved as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature),²¹ it seems well-

¹⁹ Johnson v. Chambers, 32 N. C. 292.

²⁰ Bragaw v. Supreme Lodge, 124 N. C. 154, 32 S. E. 544.

²¹ Cal. Code Civ. Proc., § 1960.

nigh impossible that, with any regard to reasonable accuracy, the error of continued confusion should be perpetuated.

§ 9b (8). **Presumptions—In general.**—The whole history of jurisprudence illustrates the fact that among judges, as among legislators, there is a constant struggle, however ineffectual it may be, to approach uniformity in the law. Although every judge understands that each case should be determined according to its own facts, he often finds different cases so nearly analogous in the facts presented that similar instructions to the jury are appropriate in each. Judges thus find themselves not only applying to different cases the same substantive rules of law, but they derive aid from precedents even in reaching conclusions as to the facts of a given cause. To illustrate the growth of presumptions of law: There were probably instances in the history of the common law where children under seven years of age were convicted of criminal offenses.²² Judges, however, acting upon their knowledge of the incapacity of children of very tender age to form a criminal intent, undoubtedly very early instructed juries to act with caution in such cases; and later the rule was established without the aid of any statute and purely by way of judicial legislation that a child under seven years of age could not commit a felony.²³ In like manner the judges gradually developed the rule independently of statutes that if seven years elapse after a traveler has crossed the high seas without being heard from, the presumption arises that he is dead.²⁴ As another illustration of judge-made law, the courts slowly adopted the practice of instructing juries that from the long enjoyment of an incorporeal hereditament they might draw the inference of right to such enjoyment in the possessor.²⁵ These and other illustrations which will be discussed under the appropriate heads exemplify the manner in which the courts have gradually deduced canons of evidence for inferring the

²² 1 Russ. Cr., 6th ed., p. 114, m.

²³ *Post*, § 98.

²⁴ *Post*, § 61.

²⁵ *Post*, § 75 et seq.

existence of one fact from other facts which are proved and which generally accompany the facts so to be inferred. Out of these attempts of many judges to deduce rules for determining the probative effect of certain facts or groups of facts often recurring have developed many rules called presumptions, but which widely differ in importance and intensity. As we go on it will be seen that some of these presumptions play quite as important a part in the administration of justice as those parts of the municipal law which are embodied in statutes; they are of such importance that, if disregarded by a jury, the verdict will be set aside.

§ 9c (8). **Presumptions—Classification.**—On the other hand, there are other presumptions, so called, which scarcely ought to be dignified by the name, but which have been long recognized as such in the courts, and have some value in aiding the court or jury to draw the proper inferences from facts established. Although more elaborate classifications of the different presumptions have sometimes been made, the one which is most common is that of presumptions of fact and presumptions of law. Authors have sometimes added another class called mixed presumptions, meaning those partaking of the nature of both of the other classes; but the distinctions in this classification are so uncertain and refined as to be of little practical value.²⁶ Other writers again make the division into natural and legal presumptions as distinguished from what they call artificial presumptions.²⁷ The term "natural presumption" has been applied where a fact is proved, wherefrom by reason of the connection founded on experience the existence of another fact is directly inferred. Where the existence of the one fact is not direct evidence of the existence of the other, but, the one fact existing and being proved, the law raises an artificial presumption of

²⁶ See the fanciful classification of Coke cited in Best, Ev., 10th ed.

²⁷ Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711. The term "artificial presumption" is used in an in-

teresting sense in *Hanson v. Lessee of Eustace*, 2 How. (U. S.) 653, 709, 11 L. Ed. 438. See, also, cases collected in 9 Ency. of Ev., 882 et seq.

the existence of the other, it was called a legal or artificial presumption. We find them also arbitrarily divided into rebuttable and conclusive presumptions, which division has the merit of including both those of law and of fact,²⁸ and conclusive presumptions are defined as inferences which the law makes so peremptory that it will not allow them to be overturned by any contrary proof, however strong, while disputable presumptions are such inferences of law as hold good, until they are invalidated by proof of a stronger presumption. Weak, strong and violent presumptions can hardly be called divisions of the main subject, and Blackstone's term is sometimes used, questionably, in modern cases. Violent presumptions are in some states held conclusive, in others not.²⁹ Thayer says³⁰ that the discrimination between presumptions of law and what are infelicitously termed presumptions of fact, however important it may be in pleading or elsewhere, is one of no special significance in the law of evidence; for all presumptions, other than the mere nontechnical recognition, by courts, of ordinary processes of reasoning are the subject of rules of presumption, and these rules, of whatever varying degrees of stringency and exactness of application they may be, all of them, belong to the law and are rules of law. They may or may not be enforced by courts in granting a new trial,³¹ but the essential character and operation of presumptions, so far as the law of evidence is

²⁸ *Chamblee v. McKenzie*, 31 Ark. 155; *Joyner v. South Carolina R. Co.*, 26 S. C. 49, 1 S. E. 52; *Brandt v. Morning Journal Assn.*, 81 App. Div. 183, 80 N. Y. Supp. 1002; *Bouvier*, Law Dict.

²⁹ We understand by a *violent* presumption one which is very strong and forcible, although not one which is necessarily conclusive: *Shealy v. Edwards*, 75 Ala. 411, 419. The strength of the presumption is always in proportion to the frequency of the connection between the fact to be inferred and that which is proven. If the connection

be found by experience and observation to be invariable in all instances, the presumption is what in law is denominated violent, and is equal to full proof: *Davis v. Curry*, 2 Bibb (Ky.), 238, 239.

³⁰ Thayer, *Cases on Ev.* 42.

³¹ *Best, Ev.*, §§ 314, 321, 323, 327. "We find the same presumption spoken of by judges sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, and sometimes as one which it was obligatory on them to make."

concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions. With this practical dismissal of the subject of classification of presumptions, cordial approval must be expressed. In actual practice, when a presumption is to be dealt with, the lawyer need regard only the working effect of the presumption, and the stage of his action where it has appeared, the duty it casts upon him or the other side, the nature of it rather than the name, his knowledge of the essential character and operation of the presumption rather than a nodding acquaintance with fanciful names coined by over-zealous text-writers.

§ 10 (9). Presumptions of law and of fact—Distinction.

Preserving only the division of presumptions into those of law and of fact, we shall endeavor to render the confusion which has percolated through the whole subject of presumptions a little less confusing. It will be found that even these terms have been used interchangeably, though they stand far apart.³²

Among the many distinctions well drawn by able men that of Grover, J., stands pre-eminent. "The distinction between a presumption of law and of fact is, that the former is to be declared and applied by the court in all cases where the facts raising it are established; and the latter is a question for the determination of the jury, who are to exercise their judgment in the particular case and find the fact, if satisfied of its truth; or if not so satisfied, refuse to find it."³³ This is at once logical and couched in such terms as should preclude the possibility of misuse of the terms. Presumptions of law are usually founded

³² Wharton whimsically places presumptions of law as the outer guard of the gates announcing the conditions on which evidence may enter, and presumptions of fact as the inner guard to determine what

effect shall be assigned to the fact which successfully passes the ordeal of admissibility: *Crim. Ev.*, § 714.

³³ *Stover v. People*, 56 N. Y. 315, 317.

upon reasons of public policy, social convenience and safety which are warranted by the legal experience of courts in administering justice. The court may always instruct the jury as to the force and effect of legal presumptions. Presumptions of fact must always be drawn by a jury, and such presumptions result from the proof of a fact, or a number of facts and circumstances which human experience has shown are usually associated with the matter under investigation. A sharp distinction is marked by regarding a presumption of law as an arbitrary rule of law that, when a certain fact appears, a certain other fact is conclusively deemed to be established until contrary evidence is introduced; whereas a presumption of fact is merely a logical inference or conclusion which the trier of the facts is at liberty to draw or refuse to draw.³⁴ Further distinctions will be made apparent in the subsequent separate treatment of these two presumptions.

§ 10a (9). Presumptions of fact—Definition of “fact.” Around the word “fact” have been spun so many definitions that the student finds himself only too often dazed into a perfunctory elucidation of them. There is no necessity for this in the use of the term in its present connotation. Ordinarily, a fact is something done or which has come to pass; an act or deed or event; an effect produced or a result achieved; anything regarded as strictly true or actually existent, whether material or mental; reality; actuality.³⁵ These dictionary definitions have found support in recent cases which adopt the ideas of actuality, achievement, and accomplishment with respect to it.³⁶ In legal use it includes the fact that any mental condition of which any person is conscious exists.³⁷ In this aspect it requires a little consideration. The popular acceptance of the term

³⁴ *United States v. Searcey*, 26 Fed. 435, and other cases collected in 9 *Ency. of Ev.* 883. It is public policy which is the mother of presumptions: *The Ship Poll Cary*, 45 Ct. of Cl. (U. S.) 219.

³⁵ *Standard Dictionary*.

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³⁶ *Gates v. Haw*, 150 Ind. 370, 50 N. E. 299; *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155. “A fact is something fixed, unchangeable”: *Huber v. Guggenheim*, 89 Fed. 598.

³⁷ *Stephen, Digest Ev.*, art. 1.

does not go so far. It stops at a fact being an existing or true thing. The legal meaning is not limited to what is tangible or visible or in any way the object of sense. Things invisible, mere thoughts, intentions, fancies of the mind, when conceived of as existing or being true, are conceived of as facts.³⁸ For the student to evolve his own idea of what a legal fact is in its relation to evidence, the first step in his process of ratiocination must be the recognition that the signification of the term "evidence" is not self-contained; and that "it presents no complete idea to the mind, unless in connection with the object to which it necessarily relates. *That object is fact or matter of fact.*"³⁹ Strange to say, "fact" and "evidence" have been used synonymously with a disregard of the accumulating heap of confusion on to which every scrap of evidentiary difficulty is thoughtlessly flung. Analytical judges have endeavored to stay these verbal scavengers in vain.⁴⁰ Occasionally the paradoxical term, "false facts," is encountered. Burrill⁴¹ puts it substantially, that to be available for any human purpose, facts must become the subjects of human observation. "A fact, as observed, is often the real fact as it exists; and the impression made through the senses, upon the mind, is, so to speak, an exact copy of it. But frequently this is otherwise; an appearance resembling the fact, or a counterfeit presentment of it, impresses the sense so strongly, that it is allowed to take its place, and is believed and reported as such." This, however, is a comparatively rare situation, and in its every-

³⁸ Thayer, Prel. Treat. on Ev. 191.

³⁹ Burrill, Circ. Ev. 2.

⁴⁰ McCabe, J., in *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879; and the same judge in *Gates v. Haw*, 150 Ind. 370, 50 N. E. 299. Elliott, J., in *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82: "Statements of mere matters of evidence are out of place in a special finding. . . . Evidence and facts are essentially different things. We cannot do otherwise than eliminate the statements of

the evidence from the facts stated by the court." Bennett, J., in *Clay County v. Simonsen*, 1 Dak. 405, 46 N. W. 592, 595: "Every fact which the plaintiff must prove to entitle him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred and set forth according to their legal effect and operation, and not the evidence of those facts."

⁴¹ Burrill, Circ. Ev. 218.

day legal sense the fact is, as the same learned writer puts it, an actual reality or verity, something positively true, which has actually existed or does exist, an event which has actually occurred or does occur. "This is fact in the abstract, such as may exist independently of any human observation, opinion or judgment respecting it. In this sense, fact and truth are synonymous, and the idea of fact is wholly at variance with anything like deception or error."⁴² One of the clearest expositions of the meaning of facts is as follows:

When a controversy is submitted, the first and most essential step is to determine the facts, for the facts are the source and cause of the law. A "fact," as the term is used in legal proceedings, is an event, a thing done or said, an act or action which is the subject of testimony. The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, the feeling is a fact. If the operations of the mind produce an effect, as knowledge, skill, intention, this effect on the mind is a fact. When the mental processes lead up to and produce a desire or intention to do a certain thing, such state of mind is a fact. Willfulness is a desire or intention to produce a certain result; hence willfulness is a fact. This, at least, is the general rule. We ascertain the existence of a fact by means of evidence. The evidence, and each item thereof, are, in a certain sense, facts. But the different items of the evidence are not necessarily such facts as call in operation the law. It is the proof—the facts resulting from the evidence—that invoke the law. It is the chief purpose of a judicial inquiry to ascertain the probative or ultimate facts. The application of the law to them follows as a necessary incident.⁴³ Bentham and Best both

⁴² Id. The terms "truth" and "fact," however, are not, in pleading, synonymous: *Pool v. Railroad Co.*, 23 S. C. 289; *Lawrence v. Wright*, 9 Super. Ct. N. Y. (2 Duer) 673, 2 Wait Pr. 307; *Ensign v. Sherman*, 14 How. Pr. (N. Y.) 439. In the last-named case, Strong, J., says: "My impression is, that mere formalities,

and especially those including falsehoods, are abolished by the code, and truth substituted in their place, and so far . . . there is an improvement. *Oh, si sic omnia!*"

⁴³ *Barr v. Chicago, St. L. & P. R. Co.*, 10 Ind. App. 433, 37 N. E. 814, 815.

name six divisions of facts, physical, psychological, events, states of things, positive and negative,⁴⁴ and they thus distinguish between them. "A physical fact is a fact considered to have its seat in some inanimate being; or if an animate being, by virtue, not of the qualities by which it is considered animate, but of those which it has in common with the class of inanimate beings. A psychological fact is considered to have its seat in some animate being; and that, by virtue of the qualities by which it is constituted animate." They mark the difference between events and states of things as that between the existence of a portion of matter inanimate or animate either in a state of motion or in a state of rest. Thus the existence of a tree is a state of things; its fall, an event. As to the last two of those named it is said: "The only really existing facts are positive facts. A negative fact is the nonexistence of a positive one and nothing more; though, in many instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised."⁴⁵

§ 10b (9). **Presumptions of fact—Use of the phrase "matter of fact."**—An eminent English writer says: "By a matter of fact—I understand anything of which we obtain a conviction from our internal consciousness or any individual event or phenomenon which is the object of sensation."⁴⁶ It is used, also, by Greenleaf in his definition of evidence,⁴⁷ when he says it includes all the means by which any alleged "matter of fact" is established or disproved. Notwithstanding some writers are inclined to adopt the view that it is a division of the main term "fact," we are of the opinion that the phrase should be construed as alluding to the particular fact then under discussion,

⁴⁴ Bentham, *Jud. Ev.*, c. 3; Best, *Ev.*, §§ 12, 13.

⁴⁵ The excerpts are made from Bentham. Best follows him almost *ipsissimis verbis*.

⁴⁶ Sir George C. Lewis, *Authority in Matters of Opinion*, c. 1. The learned writer, however, limits his definition to individual sensible ob-

jects, thus excluding general expressions or formulas, descriptive of classes of facts or sequences of phenomena, such as that the blood circulates or the sun attracts the planets, and the like. To that extent, therefore, his qualified definition is not satisfying.

⁴⁷ *Ante*, § 3.

and in the plain sense of the words. No useful end is gained by manufacturing a purely technical term of the phrase, the two introductory words not altering the character of the word, and serving only to indicate the particular question of fact under consideration. It is to be noted that the statutory definition of evidence uses the phrase shorn of the words "matter of." Stephen speaks of "what facts" may be proved, not what matters of fact. The codes use the words "question of fact." In the interpretation, therefore, of the phrase, the safer method is to deal with it not as a "matter of fact," but as a matter of "fact," indicating that a particular fact is at that moment the subject that occupies the attention and calls for consideration. It can safely be used as distinguishing the subject from a matter of law or a matter of opinion or a matter of anything else, but in the desire to keep so vast a subject as the law of evidence within reasonable bounds every effort should be made to avoid a hypertrophy of definition and limit those digressions which too often render irksome the consideration of an interesting and important subject.

§ 10c (9). Presumptions of fact—Definitions and illustrations.—The difficulty which the reader must encounter in dealing with "presumptions of fact" is not diminished by the knowledge that not only is the subject elusive but the title of it is really a makeshift for want of better nomenclature. That inferences or assumptions or presumptions of fact have passed by the title name from the earliest times is perhaps the only excuse that can be offered for their continuance, except the time-honored one of shrinking from the introduction of one more technical term into the legal vocabulary. It is always interesting to read what Blackstone has to say on any subject, and the terms he used are still occasionally to be met with.⁴⁸ "Violent presumption is many times equal to full proof; for there those circumstances appear which necessarily attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot

⁴⁸ Cooley's Blackstone, p. 1132.

prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight; as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. Light or rash presumptions have no weight or validity at all." It has been said that presumptions of fact can hardly be classed with propriety as belonging to this branch of the law. Says Professor Greenleaf: "They are in truth but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject matter; and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from these connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which,

by means of such an instrument, had been burglariously entered.”⁴⁹ These are sometimes called natural presumptions, since they are supposed to correspond with those inferences which the reasoning process would ordinarily deduce from a given state of facts, and do not depend upon those artificial rules which precedent has developed into law. Among the illustrations which have been given of presumptions of fact are the following: The presumption of guilt derived from foot-marks, resembling those of a particular person, being found on the snow or ground near the scene of crime. The presumption of homicide from previous quarrels or from the accused having a pecuniary interest in the death of the deceased.⁵⁰ The most familiar illustration, and the one most cited, is that derived from the Scriptures, in which Solomon determined that the pretended mother was not the real mother of the child she was willing to have divided in twain.⁵¹ Other illustrations are thus given by Mr. Starkie: “Presumptions, and strong ones, are constantly founded on a knowledge of mankind; a man’s motives are inferred from his acts, and his conduct from the motives by which he was known to be influenced; it is presumed, that a rational agent intended the consequence which his acts naturally tended to accomplish; that he consults his own interests; that if he pays or acknowledges a debt it is really due; that if he admits himself to be guilty of a crime the admission is true; that he does not commit a crime, or do any other act which tends to prejudice, without a motive. Presumptions of this nature, in almost every case of circumstantial evidence, afford a light which may be considered to be absolutely essential to the discovery of truth; but then they operate simply by their own intrinsic efficacy as ascertained by experience, and never so conclusively as to form the basis of an artificial rule which is to operate invari-

⁴⁹ Greenl. Ev., § 44. But they must be based on known facts and not on presumptions: *Manning v. Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 50 L. Ed. 564, 26 Sup. Ct.

Rep. 303; *Byczynski v. Illinois Steel Co.*, 115 Ill. App. 326; *Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 61 C. C. A. 532.

⁵⁰ Best, Ev., 10th ed., § 319.

⁵¹ 1 Kings, c. 3.

ably.”⁵² “Presumptions,” says Best, J., “are nothing more than weighing probabilities and deciding by the power of common sense on which side the truth is”; and Abbott, C. J., in the same case said: “A presumption of any fact is probably an inferring of that fact from other facts that are known; it is an act of reasoning.”⁵³ A legal author says that the distinction between presumptions of law and presumptions of fact is in truth the difference between things that are in reality presumptions (in the sense explained above) and things that are not presumptions at all, and a presumption of fact in the usual sense is merely an improper term for the rational potency, or probative value, of the evidentiary fact, regarded as not having the necessary legal consequence, i. e., as to the duty of production of other evidence by the opponent.⁵⁴ He indorses Greenleaf’s statement that they are “mere arguments,” and concludes his indictment of the misnomer in these words: “So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term ‘presumption’ to such facts, however great their probative significance. The employment here of the term ‘presumption’ is due simply to historical usage, by which ‘presumption’ was originally a term equivalent, in one sense, to ‘inference,’ and the distinction between presumptions of fact and of law was a mere borrowing of misapplied continental terms. There is in truth but one kind of presumption; and the term ‘presumption of fact’ should be discarded as useless and confusing.” Many courts have adopted the proposition that presumptions of fact are inferences, which from certain proven facts are to be considered as *prima facie* established, or which, in the absence of rebutting evidence, should be or may be drawn by the court or jury and which must yield to direct rebutting evidence.⁵⁵ Presumptions of fact generally are questions of fact. They are merely the major premises of

⁵² Stark. Ev., 9th ed., p. 744.

⁵⁴ Wigmore on Ev., § 2491.

⁵³ Rex v. Burdett, 4 Barn. & Ald.
95, 161, 106 Eng. Reprint, 873.

⁵⁵ See cases collected in 22 Am. & Eng. Ency. of Law, 1235.

those inferences which juries are at liberty to draw, in the light of their experience as men of the world, from the facts directly proved.⁵⁶ There exists no need for further definition or authority. The nature of a presumption of fact is known sufficiently by the plain terms of its description, which may be summarized as an inference or logical argument of one fact from another which has been proved. It is a simple piece of reasoning on the lines of cause and effect—it is a concrete proposition that inasmuch as A, a known fact has been proved, that B, another and a detached fact, may be inferred from such proof.⁵⁷

§ 10d (9). Presumptions of fact—Difficulty of classification.—It is evident that many of the instances commonly cited as examples of presumptions of fact are mere illustrations of circumstantial evidence. They are inferences drawn by the ordinary reasoning powers and without the aid of any artificial rules of law; inferences which, however well founded under some circumstances, are entirely unjustifiable under others, and which from the infinite complexity of human affairs are too uncertain and unreliable to be urged upon juries except in an advisory manner. Since these inferences, sometimes called presumptions of fact, are mere permissible deductions from the evidence, it has often been suggested that they are in fact not presumptions at all. But they are constantly recognized in the decisions, although often in a confused and inaccurate manner.⁵⁸

A little consideration will serve to show the practical impossibility of classifying such presumptions. They arise in a legion of forms in a legion of cases and are kaleidoscopic in their infinite variety. Attempts have been made by legal and philosophical writers, but their well-meant efforts leave the impression of enumeration rather than classification. It is not to be inferred from our treatment of a few of the many presumptions of fact that we have

⁵⁶ *Commonwealth v. Briant*, 142 Mass. 463, 56 Am. Rep. 707, 8 N. E. 338; *Leighton v. Morrill*, 159 Mass. 271, 34 N. E. 256.

⁵⁷ Further illustrations will be found collected in 9 Ency. of Ev. 884.

⁵⁸ See interesting discussion, Thayer, *Prel. Treatise on Ev.*, p. 339.

attempted any general classification. The whole of this and the succeeding chapter are devoted to a discussion on the best known presumptions which have readily lent themselves to useful juridical analysis, but we disclaim any effort to do more than explain them in their order. After all the lawyer is more interested in the particular presumption to which his attention is for the time being directed than in any academic distinction or artificial arrangement which places that presumption in a particular class or in a particular place in that class.

§ 10e (9). Presumptions of fact—Danger of English precedents.—The difficulty of classification above referred to is, to a certain extent, overcome by our ready means of research for precedents through the media of such excellent digest systems as the legal press affords, and we avail ourselves freely of English decisions—more especially contemporaneous ones—to either strengthen a position or create a new one if required. But the monitory words of Doe, J.,⁵⁹ must always be kept in view: “Among the various ways in which the province of the jury has been encroached upon, in England, the use of legal presumptions as substitutes for evidence is one of the most conspicuous. In this country, where the right of the jury, and the right of parties to a full trial of facts by jury, are more carefully observed, the English collection of legal presumptions is not to be adopted upon the mere strength of precedent. In each instance a critical examination is to be made to ascertain whether that which is asserted as a legal presumption is anything more than a conclusion of fact at which the court may think the jury ought to arrive.”

§ 10f (9). Presumptions of fact—Always rebuttable.—The use of the term “presumption” carries with it its possibility of rebuttal or refutation; and by having always in mind the fact of its nonconclusiveness, much of the confusion caused by the name vanishes. As, correctly speaking, it is not a presumption at all but a mere permissible

⁵⁹ *Lisbon v. Lyman*, 49 N. H. 553, 563; 9 Ency. of Ev. 884.

inference having no legal significance,⁶⁰ its import and its importance vanish so soon as a rebuttal is furnished by the opponent. Bearing, too, always in mind that a presumption has only the effect of throwing upon him against whom it is raised the burden of proceeding with his proof, but not shifting the general burden of proof in the case, it will be recognized easily that so soon as he discharges his burden, that is to say, adduces contrary evidence, the presumption vanishes entirely; until destroyed it is the waterspout which threatens the existence of his ship of litigation, but when destroyed by the cannon of contrary evidence it falls, a harmless and often refreshing shower about the vessel. Presumptions cannot be indulged in opposition to facts which show that the fact sought to be established by presumption can have no existence. They are only indulged in to supply the absence of evidence or averments respecting the facts presumed, and have no place for consideration when the evidence is disclosed or the averment is made;⁶¹ and it is always error to assume that a presumption prevails if there is evidence to rebut it.⁶² Presumptions are indulged in to supply the place of facts. They are never allowed against ascertained and established facts; when such facts appear, presumptions disappear.⁶³

§ 10g (9). Presumptions of fact — Probative force.— From what we have just stated, it follows that it is proper to regard a presumption of fact, not as evidence at all, but only as the result of evidence. A presumption which the jury is to make is not a circumstance in proof.⁶⁴ The United States supreme court has, we think, finally dealt with the question. In one case⁶⁵ White, J., speaks of legal presumptions as evidence giving rise to resulting proof

⁶⁰ See cases collected in 9 Ency. of Ev. 884.

⁶¹ Galpin v. Page, 85 U. S. 350, 365, 21 L. Ed. 959, 963; Largen v. State, 76 Tex. 323, 13 S. W. 161, and cases cited in 9 Ency. of Ev. 885.

⁶² Diefenthaler v. Hall, 96 Ill. App. 639.

⁶³ Lincoln v. French, 105 U. S. 614, 26 L. Ed. 1189.

⁶⁴ United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Manning v. Ins. Co., 100 U. S. 693, 25 L. Ed. 761.

⁶⁵ Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 493, 15 Sup. Ct. Rep. 394.

to the full extent of their legal efficacy, but in another⁶⁶ Fuller, C. J., says: "The court might well have refused to give an instruction which was in these words, and which it will be noted contain the dictum of White, J.: 'Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. *This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy.*'" The reason the learned chief justice assigned for the justification of the court's refusal to give this instruction is "the ground of the tendency of the closing sentence to mislead." In a California case⁶⁷ the dictum of Fuller, C. J., was adopted, the court not dealing with the question of whether or not it was correct, as a matter of judicial literature, to call a presumption of innocence evidence. The opinion of Fuller, C. J., referred to was delivered after Thayer's famous lecture on the Presumption of Innocence, at Yale University in 1896,⁶⁸ in which he dealt at length with the opinion of White, J., above referred to, and may be taken as having been written by the additional light of the thoroughness of Thayer's treatment. The cases are numerous on both sides of the question, but we feel that the weight of authority is against regarding a presumption as evidence notwithstanding the dictum of Redfield, C. J., that the fair inferences from evidence founded upon the natural course of business and of human experience are as much evidence as the principal facts from which the deductions flow.⁶⁹ Much of the confusion is caused by the careless use of the term, and the habit of styling what is really *prima facie* evidence a presumption, from the reason that they often mark the same stage and bring a cause to the same point,—that of forcing the opponent to proceed. There are, however dicta in some of the states which follow the Vermont

⁶⁶ Agnew v. United States, 165 U. S. 36, 41 L. Ed. 624, 630, 17 Sup. Ct. Rep. 235.

⁶⁸ Thayer, Prel. Treat., Appendix B.

⁶⁹ Austin v. Bingham, 31 Vt. 577.

⁶⁷ People v. Linares, 142 Cal. 17, 75 Pac. 308.

chief justice. In California, we find: "Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."⁷⁰ We have selected this case for the reason that it exemplifies the inaccuracy. It says that when the fact is proven contrary to the presumption, *no conflict arises*. If the presumption were evidence, and contrary evidence were introduced, a conflict would most certainly arise, but there can be no conflict between evidence and presumption for the reasons given, and hence the error in classifying the presumption as evidence. When it is considered, on the one hand, that a presumption of fact arises from evidence, that it is an inference from a fact in evidence, that that evidence appears in a record which contains all the evidence in the cause, and does not contain a scintilla of reference to any presumptions which arise from that evidence, and, upon the other hand, that while the subjects of evidence are demonstrated, stated, exhibited or written, the drawing of the inference is a mental process, the distinction affords a material aid in determining the accurate signification and import of the term.

§ 11 (10). Presumptions of law—Definitions.—When an inference derives from the law some arbitrary or artificial effect, and is obligatory upon judges and juries, that inference is a presumption of law. It arises when the facts found are in point of law inconsistent with any supposition except that of the existence or nonexistence of the fact in controversy, in which case the conclusion is necessary,—independently of any belief based upon what is more or less probable,—because the law declares the uniform effect of such a state and condition of circumstances.⁷¹ Pre-

⁷⁰ *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 529, 39 Pac. 922.

Sup. Ct. Rep. 582. See, also, *Cleveland etc. R. Co. v. Lynn (Ind.)*, 98 N.

⁷¹ *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 27 L. Ed. 337, 1

E. 67.

sumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only *prima facie* evidence, and may be rebutted.⁷² A presumption of law is one which a judge draws from the language or principles of the law and from particular facts or evidence, unless or until the truth of such inference is disproved. Such presumption derives its force from the law, and it should only be rebutted by clear and satisfactory proof to the contrary.⁷³ It is a juridical postulate that a particular predicate is universally assignable to a particular subject and derives its force from jurisprudence as distinguished from logic.⁷⁴ It is a presumption artificially made by annexing a rule at law or legal incident to a particular fact proved.⁷⁵ Presumptions of law are, in reality, rules of law and part of the law itself; and the court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise; while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of a jury.⁷⁶ Presumptions of law consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not, therefore, peculiar to municipal law, but are shared by it in common with other departments of science.⁷⁷ As we have said, these presumptions spring from the matrix of public policy. Some of them have become so well established as to be

⁷² United States v. Searecy, 26 Fed. 435, 437.

⁷³ United States v. Sykes, 58 Fed. 1000, 1004.

⁷⁴ Whart. Cr. Ev., § 707; 2 Whart. Ev., § 1237; Territory v. Lucero, 8 N. M. 543, 46 Pac. 18.

⁷⁵ Burrill, Circ. Ev. 52; Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161.

⁷⁶ Best, Presump. 18; Doane v. Glenn, 1 Colo. 495.

⁷⁷ Taylor, Ev., § 70; Sutphen v. Cushman, 35 Ill. 188.

conclusive as rules of law, while others are only *prima facie* evidence, and may be rebutted.⁷⁸

§ 11a (10). Presumptions of law—Conclusive and disputable.—Presumptions of law are generally divided into two classes, conclusive and disputable. Conclusive or absolute presumptions of law are rules determining the quantity of evidence requisite for the support of any averment which is not permitted to be overcome by any proof that the fact is otherwise.⁷⁹ In the earlier treatises on the law of evidence various presumptions were treated under this head which are no longer so classified. It will be seen, as the discussion proceeds, that courts are inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts. Instruments under seal were once regarded as conclusive evidence of a consideration, unless the instrument was impeached for fraud.⁸⁰ Receipts under seal were conclusively presumed to import the payment of money.⁸¹ But few of the numerous presumptions formerly called conclusive can now be so classified. At common law infants under seven are presumed to be incapable of committing crime. A boy under fourteen is conclusively presumed incapable of committing a rape; a female of tender age is conclusively presumed incapable of consenting to sexual intercourse. This age, not having been precisely determined in the common law, was fixed by statute in the reign of Queen Elizabeth at ten years.⁸² So the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.⁸³ In the absence of statutory regulations there may be still cited as illustrations of conclusive presumptions of law the presumptions that persons know the law by which they are governed, and that sane persons know the consequences of their acts. Yet it may well be urged that all of these so-called conclusive presumptions may be more properly

⁷⁸ *City of Indianapolis v. Keeley*,
167 Ind. 516, 79 N. E. 499.

⁷⁹ 1 Greenl. Ev., § 44.

⁸⁰ Best, Ev., 10th ed., § 220.

⁸¹ Best, Ev., 10th ed., § 406.

⁸² 1 Bish. Cr. L., c. 26, §§ 461, 466;
Best, Ev., 10th ed., § 438; 4 Bl. Com.
212; 3 Greenl. Ev., § 211.

⁸³ *Post*, § 95.

described as substantive rules of the law than as conclusive presumptions of law. The same remark applies to most of the statutes of limitations, which are sometimes regarded as creating conclusive presumptions. Whether or not these presumptions are to hold their place as conclusive, it is evident that by far the greater number of legal presumptions belong to the class known as disputable presumptions; or those presumptions which arise and continue until they are overcome by evidence, or by some stronger presumption. The presumption of innocence, of legitimacy, and, indeed, most of those discussed in the following pages, are illustrations of this class. An eminent author says⁸⁴ that in strictness there cannot be such a thing as a conclusive presumption, because wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the *purpose* of the proponent's case;⁸⁵ and to provide this is to make a rule of substantive law, and not a rule regulating the burden of coming forward with evidence. While on strictly logical grounds this contention is true, we must not lose sight of the fact that the term is not only popularly sanctioned, but legally authorized by its statutory adoption, and it is better, therefore, to utilize it irrespective of the suggested inaccuracy than to risk the construction of a substituted technical term which might not be as well able to stand the strain of a higher critical analysis. We also prefer to retain the two main divisions named at the head of this section. In an old case in Georgia⁸⁶ we find the court dividing presumptions into two kinds: "*First*, such as are made by the law itself; or, as they are called, presumptions of *mere law*. *Secondly*, such as are to be made by a jury, or presumptions of *law and of fact*. Again, presumptions of *mere law* are either absolute and conclu-

⁸⁴ Wigmore on Ev., § 2492.

⁸⁶ Bryan v. Walton, 20 Ga. 480.

⁸⁵ See State v. Platt, 2 S. C. 150,
154, 16 Am. Rep. 647.

sive: as, for instance, that a bond or other specialty was executed upon a valid consideration cannot be rebutted by evidence, so long as the presumption is not impeached for fraud (4 Burrow, 2225), or they are not absolute, and may be rebutted by proof." A later case from North Carolina⁸⁷ divides them into four classes: "1. Irrebuttable presumptions of law. 2. Rebuttable presumptions of law. These are acted on by the court itself as a part of the law. 3. Mixed presumptions, called mixed, because the court lays down the law and the jury acts upon it. 4. Presumptions of fact, subdivided into slight and strong presumptions, according to their effect upon the burden of proof. These are exclusively for the jury." Many of the text-writers adopt these numerous divisions, but experience has shown us that all presumptions of law may be satisfactorily grouped into the two classes we have named—conclusive and disputable.

§ 11b (10). Presumptions of law—Statutory classification.—In some of the code states, an excellent division of what presumptions are to be deemed conclusive and what disputable has been made. For ready reference to such of them as are treated in the following pages, the provisions of one of the codes are given in full.

Specification of conclusive presumptions.⁸⁸—The following presumptions and no others are deemed conclusive: 1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another; 2. The truth of the facts recited, from a recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of consideration; 3. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot,

⁸⁷ Lee v. Pearce, 68 N. C. 76.

⁸⁸ Cal. Code Civ. Proc., § 1962; Mont. Rev. Code, § 7961. Lord's Or. Laws Code, § 798, adds a further

conclusive presumption: "An intent to murder, from the deliberate use of a deadly weapon, causing death within a year."

in any litigation arising out of such declaration, act or omission, be permitted to falsify it; 4. A tenant is not permitted to deny the title of his landlord, at the time of the commencement of the relation; 5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate; 6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence; 7. Any other presumption which by statute is expressly made conclusive.

All other presumptions may be controverted.⁸⁹—All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: 1. That a person is innocent of crime or wrong; 2. That an unlawful act was done with an unlawful intent; 3. That a person intends the ordinary consequences of his voluntary act; 4. That a person takes ordinary care of his own concerns; 5. That evidence willfully suppressed would be adverse if produced; 6. That higher evidence would be adverse from inferior being produced; 7. That money paid by one to another was due the latter; 8. That a thing delivered by one to another belonged to the latter; 9. That an obligation delivered up to the debtor has been paid; 10. That former rent or installments have been paid when a receipt for later is produced; 11. That things which a person possesses are owned by him; 12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership; 13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid

⁸⁹ Cal. Code Civ. Proc., § 1963; Mont. Rev. Code, § 7962. The North Dakota Code of Civil Procedure, section 7317, adds two disputable presumptions to the above list: "41. That the foreign law will be presumed to

be the common law in the absence of rebutting evidence. 42. A domicile once acquired is presumed to continue until it is shown to have been changed."

the money or delivered the thing accordingly; 14. That a person acting in a public office was regularly appointed to it; 15. That official duty has been regularly performed; 16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction; 17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties; 18. That all matters within an issue were laid before the jury and passed upon by them, and, in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them; 19. That private transactions have been fair and regular; 20. That the ordinary course of business has been followed; 21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration; 22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill; 23. That a writing is truly dated; 24. That a letter duly directed and mailed was received in the regular course of the mail; 25. Identity of person from identity of name; 26. That a person not heard from in seven years is dead; 27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact; 28. That things have happened according to the ordinary course of nature and the ordinary habits of life; 29. That persons acting as copartners have entered into a contract of copartnership; 30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage; 31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate; 32. That a thing once proved to exist continues as long as is usual with things of that nature; 33. That a law has been obeyed; 34. That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained; 35. That a printed and published book purporting to be printed or published by public authority was so printed

or published; 36. That a printed or published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases; 37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest; 38. The uninterrupted use by the public of land for a burial ground for five years, with the consent of the owner, and without a reservation of his right, is presumptive evidence of his intention to dedicate it to the public for that purpose; 39. That there was a good and sufficient consideration for a written contract; 40. When two persons perish in the same calamity, such as a wreck, a battle or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules: First. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived. Second. If both were above the age of sixty, the younger is presumed to have survived. Third. If one be under fifteen, and the other above sixty, the former is presumed to have survived. Fourth. If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same, then the older. Fifth. If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

The practice of codifying these presumptions should commend itself to all the states which have not yet classified them. Even in those states where there is no codified system, the collection of such rules into a statute will be found of great convenience, and renders the search for decisions upon them correspondingly easier.

§ 11c (10). Conflicting and counter presumptions.—Before proceeding to the discussion of particular cases of presumption, it is well to consider these terms, the former

of which, notwithstanding condemnation by competent authorities, will be continually met with in important cases. As one author correctly puts it, the evidentiary facts may tend to opposite inferences, which may be said to conflict. A little examination will demonstrate this. Assuming that from a certain fact an inference arises in favor of A, the result of that presumption is that B, his opponent, is called upon to come forward with his evidence at that stage. Assuming that he does, and from certain other facts proved by him, another inference is to be drawn with the result that it behooves A in his turn to proceed, it cannot correctly be said that these presumptions are in conflict, for they have not met. The original presumption caused by A had disappeared after B brought forward his facts to overcome it, and B's presumption, if any, alone remained. This process might be repeated at various stages of the cause, and the suggestive and successful naming of them as successive presumptions may well be taken in lieu of the older name. "This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out . . . and the ultimate key to the situation is very often found by ascertaining the incidence of the burden of proof in the other, i. e., the ultimate risk of nonpersuasion." If the facts brought forward by B to meet A's presumption themselves raise a presumption in B's favor, this rare presentation is called a counter presumption.⁹⁰ Viewed in the light of the suggestion of successive presumptions, much of the difficulty caused by the appearance of more than one presumption in a case entirely disappears. In a Missouri opinion the court puts it that "the result is that one presumption rebuts and neutralizes the other, like the conjunction of an acid and an alkali."⁹¹ So where two successive marriages are charged in a prosecution for bigamy, and it is said the presumption in favor of the legality of each is equal and

⁹⁰ Wigmore on Ev., § 2493.

⁹¹ Yarnell v. Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1.

an actual marriage in each case must be proved, there is in reality no conflict of the presumptions at all, because there could not be a presumption that both such marriages were legal; and the presumptions of the several marriages, like the swinging figures on a Dutch clock, show only one at a time.⁹² A presumption subsequently appearing may be stronger than one previously presented, and because it is said to overcome it, the idea of conflict is readily assumed. An excellent illustration occurs in a Wisconsin opinion in a trial for bigamy.⁹³ The first marriage was alleged to have taken place in Prussia, where to constitute a valid legal marriage it must be entered into as a civil contract. It was common to have a religious ceremony in addition, and the celebration of such religious marriage, without the civil marriage having been performed, was prohibited under severe penalties. It was necessary for the prosecution to prove the valid legal marriage, but the only proof was of the religious one, performed according to the custom of the Jews. The court instructed the jury that if they were satisfied of the performance of the religious ceremony, and that by the law the Jewish priest was liable to severe penalties for performing it, if there had been no civil ceremony, they might infer the performance of the civil ceremony. This instruction was erroneous. There was no logical connection between the two facts. The only ground for inferring the civil from the religious marriage was the presumption that the Jewish priest would not have performed the latter unless the former had taken place. But this is hardly compatible with the strictness required in proving the essential facts in a criminal prosecution. Where the law requires proof of an actual legal marriage, it cannot be permissible to prove it by merely showing some other act performed by another person, and which he was forbidden under penalties to perform unless the actual marriage had previously taken place. The utmost effect of such evidence would be to create the pre-

⁹² *Lowery v. People*, 172 Ill. 466,
64 Am. St. Rep. 50, 50 N. E. 165.

⁹³ *Weinberg v. State*, 25 Wis. 370,
and see cases collected in 9 Ency. of
Ev. 892.

sumption that the priest would not have violated the law of the country where he acted. Of course, if he had been prosecuted there for such violation, that presumption would have existed in his favor. Perhaps, under the justly liberal rule in respect to proof of foreign marriages, in civil suits, it would also be allowed to prevail. But to give it that effect in a criminal prosecution would be to overcome the presumption of the prisoner's innocence by the no stronger presumption of the innocence of a stranger, and that in a proceeding in which such stranger was not on trial. This is not consistent with the strictness required in criminal prosecutions. In these there must be proof, either direct or circumstantial, having some intrinsic tendency to establish the facts showing guilt. In this light, too, it has been held that special presumptions must prevail over general presumptions. In a prosecution for embezzlement, where it was urged that the presumption of innocence should overcome that in favor of the correctness of the defendant's books which showed his defalcations, we find: "This contention rests upon the unsubstantial ground that the general presumption of innocence is irrebuttable by any other legal and favored presumption. The rule is, in case of conflicting legal presumptions, the special and favored must prevail, or take precedence over the general. And the practical operation of this rule we see constantly exemplified in trials for murder. In these trials for even capital offenses we shall constantly find the legal presumption of malice, arising from the use of a deadly weapon, and we shall see this presumption taking precedence over the general presumption of innocence, in the absence of any other evidence showing circumstances of justification or excuse for the homicide."⁹⁴ The keynote is struck in the opening sentence of the excerpt, and conveys the impression that merely a hair-splitting contention was raised in the accused's defense, and although the court did use the term "conflicting" with regard to the two presumptions, sanctioned, as we have said, by usage, the case referred to shows no antagonism between the two

⁹⁴ *Hemingway v. State*, 68 Miss. 371, 8 South. 317, 323.

assumptions. That the accused was to be deemed innocent until he was proved guilty, and that his books were to be deemed correct, are two distinct presumptions arising from two distinct sources, the one not founded on, or dependent, or inconsistent with the other, and the argument was properly reduced to an *ad absurdum* by the court pointing out that if it were not permissible to instruct a jury in a criminal case that there existed a legal presumption of the correctness of official books, then the presumption of innocence became irrebuttable by any other presumption—"a proposition not to be tolerated in a court of law." In concluding this portion of the general treatment of the subject, we may summarize the discussions by pointing out that the true solution of each problem presented lies in its consideration on original lines and without the questionable aid of half authorized technical terms. So long as a logical conclusion can be reached, little thought need be given to whether any of the terms "conflicting," "successive" or "counter" should be used. The point upon which the attention should be focused is the source of the presumption in each case, its compass, its individual operation and effect, its conclusiveness or rebuttability. The converging rays will unfailingly disclose the origin, and the bogies of presumption on presumption and presumption versus presumption will be found after all to be no more than the illuminated turnip-tops of erroneous premises—that the so-called second presumption has arisen perchance from the same facts as the first; that there was no fight between belligerent presumptions, but that one ran away when the stronger one appeared, and that, properly appreciated by the open and ready mind, the subject need have no terrors for the lawyer who approaches its study with common sense and unhampered by academic, and frequently fallacious, distinctions of definition, or classification, interpretation or application.

§ 12 (11). Presumption of innocence — General acceptance.—Perhaps there is no presumption more highly favored in the law than that of innocence. The maxims,

"*Injuria non praesumitur*," and "*Odiosa non praesumuntur*," have been recognized in criminal trials under the common law for hundreds of years.⁹⁵ At a time when persons could not have the aid of counsel and could not even testify in their own behalf, the presumption involved in these ancient maxims was one of the few beneficent rules in a harsh criminal code. Although some of the reasons which led to the adoption of this presumption have disappeared with the severity of the old criminal law, yet the sacredness of reputation and liberty still gives sanction to the rule that the law presumes in favor of innocence. The favor with which this presumption is regarded in the law is illustrated in this, that when misconduct or crime is alleged, whether in a criminal or in a civil suit, whether in a direct proceeding to punish the offender or in some collateral manner, the accused is presumed to be innocent until proved guilty.⁹⁶ This is also illustrated by the fact that other presumptions are so often said to yield to that of innocence,⁹⁷ and by the fact that although ordinarily the burden of proof is on the one asserting the affirmative of the issue, yet if proof of a negative is necessary to establish guilt, such proof must be made.⁹⁸ This presumption has its most frequent application in the criminal law; indeed, it has sometimes been said to have no place in civil cases except so far as it regulates the burden of proof.⁹⁹ But it is held by the general weight of authority, as will be seen by the illustrations given below, that the presumption rests on a broader basis. As stated by Mr. Taylor: "The right which every man has to his character, the value of that

⁹⁵ Coke, Litt. 232. For a comparison as to the practice in the civil and the common law, see article in 14 Crim. L. Mag. 184. For an interesting note on the possession of recently stolen property as evidence of burglary, see *State v. Brady*, 12 L. R. A., N. S., 199.

⁹⁶ *Ross v. Hunter*, 4 Term Rep. 33, 100 Eng. Reprint, 879; *Freeman v. Blount*, 172 Ala. 655, 55 South. 293; *McNichol v. Phillips*, 131 N. Y. Supp. 726; *Best, Ev.*, 10th ed., § 346.

⁹⁷ See "*Presumption of Innocence in Relation to Other Presumptions*," § 101 et seq., *post*.

⁹⁸ *Williams v. East India Co.*, 3 East, 192, 102 Eng. Reprint, 571. *Post*, § 188.

⁹⁹ *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 24 L. Ed. 902. For discussion of limitations of the rule in *habeas corpus* cases, see note, 22 L. R. A. 678.

character to himself and his family and the evil consequences which would result to society if charges of guilt were lightly entertained, or readily established in courts of justice—these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, then, is recognized alike by all tribunals, whether civil or criminal, and is equally effective in all proceedings, whether the question of guilt be directly or incidentally raised.”¹⁰⁰ In a case which has been much discussed and criticised the following language was used: “The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.”¹

§ 12a (11). Presumption of innocence—Legal acceptance.—Following out the line of independent inquiry, we ask ourselves, What is the true meaning of the phrase as it occurs in such a sentence as, “There is a presumption of innocence in every accused person”? The answer is contained in this, that according to law the prosecutor, as we shall style him who makes the accusation, must pro-

¹⁰⁰ Tayl. Ev., 10th ed., § 112; Rice v. Gunn, 4 Ont. Rep. 579; Royal Canadian Bank v. Cummer, 15 Gr. 127.

¹ Coffin v. United States, 156 U. S. 432, 460, 39 L. Ed. 481, 15 Sup. Ct. Rep. 394. See the learned criticism of Prof. Thayer, Prel. Treatise on Ev., Appendix B, p. 551. In Agnew v. United States, 165 U. S. 36-51, 41 L. Ed. 624, 17 Sup. Ct. Rep. 235, the court held it no error for the trial judge to give this statement as an instruction, where the jury were fully instructed as to the effect of the presumption of innocence. The presumption against suicide is founded upon the natural human instinct or

inclination of self-preservation which renders self-destruction an improbability with a rational being. The act of suicide, in the absence of mental derangement, being immoral and criminal, the presumption of law is against it, as well as the presumption of fact: Grand Lodge etc. v. Banister, 80 Ark. 190, 96 S. W. 742; Aetna Life Ins. Co. v. Milward, 118 Ky. 716, 4 Ann. Cas. 1092, 68 L. R. A. 285, 82 S. W. 364. See note to Metropolitan Ins. Co. v. De Vault (109 Va. 392, 63 S. E. 982), 17 Ann. Cas. 27, on presumption of suicide relied on as defense to action on life insurance policy or benefit certificate.

duce evidence and establish his accusation that the defendant is guilty beyond a reasonable doubt. A well-known author puts it² that the presumption of innocence implies "that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure until the prosecution has taken up its burden and produced evidence and effected persuasion, i. e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it." He calls attention to one useful province of the presumption. It stands, a warning signal to the jurors that the appearance of an accused person, his place in court and his surroundings are not to be taken into account against him. He is not in fact to be prejudiced by the very fact of his indictment. Those who think that a prisoner has an equal chance with a civil defendant have not attended many criminal trials and "have failed to notice that it is more important to a man to look innocent than to be *prima facie* thought so. No defendant (in civil cases) is brought through a hole in the floor; he is not surrounded by a barrier, nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the jail of his county."³ But while he is not to be prejudiced by the circumstances of his accusation, he is only to have the protection of the presumption in the exact ratio of the carriage of the burden of proof of his guilt beyond a reasonable doubt. By the light of reason, the terms occasionally used in the defense of prisoners referring to the presumption are exaggerated accounts of the duty cast upon the prosecution and can only be regarded as exuberances. The prisoner's head is no more surrounded by a beneficent halo of constitutional right than the prosecutor's is weighted with the "awful responsibility of absolutely proving his guilt." With the slight distinction mentioned in the next section, then, the presumption of innocence is, therefore, no more and no less than that rule of law which

² Wigmore on Ev., § 2511.

³ Scintillae Juris. 28 (1877).

calls upon the accuser to establish the guilt of the accused beyond a reasonable doubt.

§ 12b (11). Presumption of innocence—Proof beyond reasonable doubt—Distinction.—Considered by the light of its terms, the presumption of innocence is a larger proposition than the duty which is cast upon the accuser to prove guilt beyond a reasonable doubt. Firstly, if a presumption, it must be rebutted or overcome; yet it does not call upon the accuser to prove that the accused is not innocent. Secondly, if the words “presumption of nonguilt” were to take the place of “presumption of innocence,” and innocence is equivalent to nonguilt, then to rebut or overcome it, the accuser would have to prove the guilt of the accused. But the rule of our law is that the accuser is not so bound. He has not to prove the accused guilty. He has only to prove guilt up to a certain point, i. e., beyond reasonable doubt, so that although “presumption of innocence” is used to denote the rule, the rule necessarily becomes an artificial signification of the principal term, which analysis discloses to be inaccurate, but at the same time assists in a sensible diminishing of the exaggerated idea of the presumption in question. This distinction has been well marked. The presumption of innocence, supplemented by any evidence an accused may adduce, together with the evidence against him, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn; whereas reasonable doubt is the condition of mind produced by the proof resulting from the evidence. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; so that one is a cause, the other an effect.⁴ The necessity for observing the distinc-

⁴ Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 15 Sup. Ct. Rep. 394. See, also, People v. Macard, 73 Mich. 15, 40 N. W. 784; Morehead v. State, 34 Ohio St. 212; Coffin v. United States, 162 U. S. 664, 40 L.

Ed. 1109, 16 Sup. Ct. Rep. 943. In the cases first cited Mr. Justice White deals with the historical aspect of the presumption. He says: “Greenleaf traces this presumption to Deuteronomy, and quotes Mascardius De

tion has arisen on the review of instructions to the jury on both or either of these points. From the authorities, it may be taken that an instruction as to reasonable doubt will not supply the place of an instruction as to presumption

Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. 'On Evidence.' Part V, § 29, note. Whether Greenleaf is correct or not in this view there can be no question that the Roman law was pervaded with this maxim of criminal administration, as the following extracts show: 'Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.' Code L. IV, T. XX, 1, 1, 25. 'The noble (*divus*) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent': Dig. L. XLVIII, tit. 19, 1, 5. 'In all cases of doubt, the most merciful construction of facts should be preferred': Dig. L. L., tit. XVII, 1, 56. In criminal cases the milder construction shall always be preserved: Dig. L. L., tit. XVII, 155, s. 2. 'In cases of doubt it is no less just than it is safe to adopt the milder construction': Dig. L. L., tit. XVII, 1, 192, s. 1. Ammianus Marcellinus relates an anecdote of the Emperor Julian, which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the

accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' Rerum Gestarum, lib. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law: Decretum Gratiani de Presumptionibus, L. II, T. XXIII, c. XIV, A. D. 1198, Corpus Juris Canonici Hispani et Indici, R. P. Murillo Velarde, tom. 1, L. 11, n. 140. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer in an able article in the North American Review, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common-law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time. Fortescue says: 'Who then, in England can be put to death unjustly for any crime? Since he is allowed so many pleas and privileges in favor of life, none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty

of innocence, when the latter is requested.⁵ There is an important conflict from which the safe conclusion to draw is that the instruction as to presumption of innocence should be given when asked. In a Missouri case,⁶ it was held that it was not reversible error to refuse to so instruct the jury where they had been instructed as to reasonable doubt, and where the evidence abundantly sustained the verdict of guilty. The United States supreme court holds the contrary. Mr. Justice White has exhaustively dealt with the question. In contrasting the two propositions he says: "To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are

persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally": *De Laudibus Legum Angliae* Amos' Translation, Cambridge, 1825. Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die": 2 Hale P. C. 290. He further observes: "And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger, *quod dubitas, ne faceris*": 1 Hale, P. C. 24. Blackstone (1753-1765) maintains that "the law holds that it is better that ten guilty persons escape than that one innocent suffer"; 2 Bl. Com., c. 27, marg. p. 358, *ad finem*. How fully the presumption of innocence had been involved as a principle and applied at common law is shown in *McKinley's Case* (1817), 33 How. St. Tr. 275, 506, where Lord Gillies says: "It is

impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression, but the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly. He seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."

⁵ *Id.*

⁶ *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293, in which the conflict is elaborately dealt with.

required to reach their conclusions upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views and indicates the necessity of enforcing the one, in order that the other may continue to exist.”⁷

§ 12c (11). Presumption of innocence—Its claim as a constitutional right.—The idea that the presumption of innocence has become in this country a constitutional right has never taken any serious hold of the people. It has nevertheless been urged, especially with regard to such legislation as casts any *onus* on the accused, that the interference with his right to the presumption of innocence was much in the nature of an attack on the divine right of kings in olden time. It has been repeatedly held that the legislature has the right to declare what shall be presump-

⁷ Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 493, 15 Sup. Ct. Rep. 394. The learned justice concluded his opinion in these words: “Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the result of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to anyone accused of crime. The importance of the distinction between the two is peculiarly emphasized here, for after having declined to instruct the jury as to the pre-

sumption of innocence, the court said: ‘If, after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief,’ etc. Whether this confining them to ‘the proofs’ and only to the proofs would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. ‘The proofs and the proofs only’ confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.”

tive or *prima facie* evidence of any fact. So long as the legislature, in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, its acts are not unconstitutional.⁸ In all statutory crimes it is competent for the legislature to say that certain acts, proven by the commonwealth, shall be sufficient to make out a presumptive case against the accused, and cast the burden of proof upon him, provided the burden is not cast upon him to prove his innocence, without first requiring the commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused.⁹ A statute whereby possession of stolen goods was declared to be *prima facie* evidence of recent possession, casting on the accused person the burden of satisfactory explanation, is not unconstitutional. It is but an extension of the rule, which has long prevailed, that possession of property recently stolen is sufficient proof that the possessor is guilty of the crime to call upon him to explain his possession; and, so far as we are aware, it has never been claimed that the holdings of the courts, that such *prima facie* presumption flowed from the fact of possession, infringed any constitutional right of the defendant. If the existence of the presumption did not infringe constitutional rights, how could it be said that the presumption which the statute authorizes the court to enforce infringes them? Therein lies the answer to the contention. The presumption is only altered from a rule of law to a statutory enactment.¹⁰ The power of a municipality, however, by ordinance to create such a presumption has been denied.¹¹

⁸ Voght v. State, 124 Ind. 358, 24 N. E. 680; State v. Beach, 147 Ind. 74, 36 L. R. A. 179, 43 N. E. 949, 46 N. E. 145; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

⁹ Commonwealth v. Minor, 88 Ky. 422, 11 S. W. 472; Commonwealth v. Smith, 166 Mass. 370, 44 N. E. 503.

¹⁰ State v. Kyle, 14 Wash. 550, 45 Pac. 147. See, also, State v. Wilson, 9 Wash. 218, 37 Pac. 424; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26, and note by the reporter.

¹¹ In re Wong Hane, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693.

§ 12d (11). Presumption of innocence — Duration of protection to accused.—There can be no doubt that much of the difficulty which arises from the application of the presumption is directly attributable to the change which time has worked in the necessity for its application. It is not within the scope of these commentaries to give the history of the rise and misconstruction of the presumption of innocence. We content ourselves with the knowledge that it sprang from the soil of oppression in the early days of English judicial procedure, and that both in England and here its development has nearly reached the final stage of its evolution. That stage is well marked in pronouncements of our courts that the so-called presumption attends the accused until it is dispelled by the evidence. A party starts into a trial, though accused by the grand jury of a crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony. "It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or that a crime has been committed. Whenever the proof shows beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent."¹² The presumption does not cease at the close either of the case for the prosecution or the defense or the submission of the case to the jury. The presumption remains to the last with the defendant and until the jury in their deliberations upon the evidence become convinced of his guilt. "When the jury reached that conclusion on the whole evidence, and beyond a reasonable doubt, of course the presumption disappeared, and should disappear."¹³ The presumption survives the finding of an indictment, arrest, arraignment and the impaneling of a petit jury for

¹² *Allen v. United States*, 164 U. S. 492, 41 L. Ed. 528, 530, 17 Sup. Ct. Rep. 154, and cases collected in 9 *Ency. of Ev.* 923.

¹³ *People v. Arlington*, 131 Cal.

231, 63 Pac. 347; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. O'Brien*, 106 Cal. 104, 39 Pac. 325; *Frazier v. Commonwealth (Ky.)*, 114 S. W. 268.

the trial of the issue. It continues during the introduction of evidence upon the trial, the summing up of counsel, the charge of the court, and until the jury by its verdict of "guilty" has said that the presumption is overcome, or, by its verdict of "not guilty," that the presumption has become an established fact.¹⁴ It is not strictly accurate to say that the "presumption of innocence prevails throughout the trial." An instruction that the presumption of innocence "attends" the accused from the beginning to the end of the trial, and must prevail unless overcome by evidence so as to establish guilt beyond a reasonable doubt, has been approved as more accurate.¹⁵ The burden of proof is with the prosecuting power, not only when the trial begins, but throughout; for the presumption of innocence, which makes it so at first, keeps it so to the end.¹⁶ Even principals in the first degree, where they sever, have no presumptions against them by reason of the fact that two may have been convicted before the third is put upon his trial; and in cases of principals in the second degree and accessories, where presumptions are applicable, the rule only goes to the extent of being conclusive as to the conviction, and not as to their guilt.¹⁷ Nor does the establishment of a *prima facie* case by the prosecution remove the presumption from the defendant as in civil cases. The presumption is left "to operate, in connection with, or in aid of, any proof offered by him to rebut or impair the *prima facie* case thus made out by the state. A circumstance aided by that presumption may so far rebut or impair the *prima facie* case as to render a conviction upon it improper."¹⁸

§ 13 (12). Same—In civil cases—Fraud and similar issues.—This presumption is of constant application in civil

¹⁴ *Gow v. Bingham*, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011, 1015; *United States v. Richards*, 149 Fed. 443.

¹⁵ *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

¹⁶ 1 Bishop, *Crim. Proc.*, § 1104; *Azsmann v. State*, 123 Ind. 347, 8 L.

R. A. 33, 24 N. E. 123; *Farley v. State*, 127 Ind. 419, 26 N. E. 898. See, also, *Waters v. State*, 117 Ala. 108, 22 South. 490; *State v. Krug*, 12 Wash. 285, 41 Pac. 126.

¹⁷ *Anderson v. State*, 63 Ga. 675; *Coxwell v. State*, 66 Ga. 309, 315.

¹⁸ *Ogletree v. State*, 28 Ala. 693.

actions when fraud is the issue—*Fraus est odiosa et non praesumenda*—or where one party is charged in any guise with conduct of a criminal nature.¹⁹ In ordinary civil cases, there is no legal presumption either way; there is nothing criminal or illegal alleged against either party; and the disputed issue is required to be established by the party upon whom the burden of proof lies, only by a fair balance of the evidence. In many cases, sounding in tort, the defendant may be legally liable, and still be involved in no intentional wrong, and no moral turpitude, and here the plaintiff encounters no legal presumption against himself in the proof. But the legal presumption is that men are not guilty of fraud and dishonesty, and more strongly, that they do not commit criminal offenses. This presumption exists no more, when a man is on trial for a criminal offense, than at any other time, or on the trial of a civil case, when an attempt is made to show that a person has committed a crime. It exists at all times, and everywhere, and is a presumption the law ever makes. Hence every man, however charged with dishonesty or fraud, or a criminal act, is always entitled to have this presumption of the law weighed in his favor, and whoever asserts the contrary, must always encounter it, and be required to overcome it by evidence.²⁰ In the ordinary

¹⁹ *Lavender v. Hudgens*, 32 Ark. 763; *Case v. Case*, 17 Cal. 598; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040; *Mead v. Husted*, 52 Conn. 53, 52 Am. Rep. 554; *Shropshire v. Stevenson*, 17 Ga. 622; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Jones v. United States Mut. Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Wilkie v. Collins*, 48 Miss. 496; *Klein v. Landman*, 29 Mo. 259; *Wilcox v. Wilcox*, 46 Hun (N. Y.), 32; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *Horan v. Weiler*, 41 Pa. 470; *Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 362, 26 Am. St. Rep. 749, 15 S. W. 1105; *Fire Assn. of Philadelphia v. Merchants' Nat.*

Bank, 54 Vt. 657; *Cronkhite v. Traveler's Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407.

²⁰ *Bradish v. Bliss*, 35 Vt. 326, from which the above is extracted, is approved in *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532, the court adding: "When, in the trial of a civil cause, a person is charged with fraud, dishonesty or crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case." This practically overruled an intermediate opinion in *Weston v. Gravlin*, 49 Vt. 507.

transactions of life, fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears.²¹ But from this it is not to be understood that fraud cannot be inferred from circumstantial evidence, as it is by evidence of this character that the charge must often, and, indeed, generally is, established.²² The party alleging fraud, deceit or fraudulent representations must produce stronger proof than would suffice to establish a mere debt or sale; it is incumbent on him to furnish sufficient proof to overcome the presumption of innocence and honesty. In actions involving fraud, as in other cases where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly preponderates for the latter, will strike the balance in favor of honesty and innocence.²³

²¹ *Gregg v. Sayre*, 8 Pet. (U. S.) 244, 8 L. Ed. 932; *O'Neal v. Boone*, 82 Ill. 589; *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *Williams v. Lord*, 75 Va. 390; *Patee v. Pelton*, 48 Vt. 182; *Price v. Gover*, 40 Md. 102; *Hatch v. Bayley*, 12 Cush. (Mass.) 27; *Silver v. Graves*, 210 Mass. 26, 95 N. E. 948. Public officers are presumed to do their duty: See *United States v. Jones*, 31 Fed. 718. It is presumed that a marriage was duly solemnized: *Sichel v. Lambert*, 15 Com. B., N. S., 781. It is also presumed that every person has conformed to the laws until contrary appears: *King v. Hawkins*, 10 East, 211, 103 Eng. Reprint, 755. Where one is shown to be a wrongdoer as to one transaction, he will not be presumed guilty of other contemporaneous acts: *Harris v. Rosenberger*, 43 Conn. 227. It is presumed that a servant is honest in turning over to his master money received: *Evans v. Birch*, 3 Camp. 10. See the late cases: *Nisbet v. Siegel-Campion etc. Co.*, 21 Colo. App. 494, 123 Pac. 110; *Forest County v. Shaw*, 150 Wis. 294,

136 N. W. 642; *Foard County v. Sandifer* (Tex.), 151 S. W. 523; *In re Mara*, 137 N. Y. Supp. 151; *In re Jacobs' Will*, 76 Misc. Rep. 394, 137 N. Y. Supp. 155.

²² *Kaine v. Weigley*, 22 Pa. 179; *Reed v. Noxon*, 48 Ill. 323; *O'Donnell v. Segar*, 25 Mich. 367; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 41; *Morford v. Peck*, 46 Conn. 380. See full discussion of this subject and many cases cited in *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154, and note, and notes in *Deshon v. Wood*, 1 L. R. A. 520, *Tuteur v. Chase*, 4 L. R. A. 832, *Rice v. Wood*, 31 L. R. A. 646, *Kansas etc. Plow Co. v. Sherman*, 32 L. R. A. 71.

²³ *Hatch v. Bailey*, 12 Cush. (Mass.) 27; *Price v. Gover*, 40 Md. 102; *Greenwood v. Lowe*, 7 La. Ann. 197; *Oaks v. Harrison*, 24 Iowa, 170; *Leighton v. Orr*, 44 Iowa, 680. The conduct of *third persons* whose acts are investigated only collaterally will also be presumed free from fraud: *Ross v. Hunter*, 4 Term Rep. 33. *Administrators and trustees* presumed to have performed their duty: *Gee v.*

§ 14 (13). **Same—As applied to the marriage relation.** It is upon the same general principle that when persons live and cohabit together and are reputed to be married, they are presumed to be married, as it will not be presumed that they have violated the law,²⁴ and where a presumption of marriage has once so arisen, it can be overthrown only by the most cogent proof. The presumption of marriage is not lightly to be repelled, nor broken in upon or shaken by a mere balance of probability. The evidence to that end must be strong, distinct, satisfactory and conclusive. It is one of the strongest presumptions known to the law, and is especially true in a case involving legitimacy. The law presumes morality, not immorality, marriage and not concubinage, legitimacy and not bastardy. The reason that underlies the doctrine of this presumption is that the law will presume innocence and morality rather

Hicks, Rich. Eq. Cas. (S. C.) 5. For discussion of presumptions and burden of proof where *fiduciary relations* exist, see *post*, § 190. An agreement to *deal in futures* presumed not unlawful: Williams v. Connor, 14 S. C. 621. *Interlineation or alteration* not suspicious on its face presumed made before execution: See § 563 et seq., *post*. *Purchase of land* for valuable consideration presumed to be made in good faith without notice of prior unrecorded deeds. See extended note to Anthony v. Wheeler, 17 Am. St. Rep. 288, citing cases. Witnesses presumed to have *testified truthfully*: Hewlett v. Hewlett, 4 Edw. Ch. (N. Y.) 7; Matthews v. Lanier, 33 Ark. 91. *Professional services* presumed necessarily rendered: Todd v. Myres, 40 Cal. 355. No presumption that acts have been done for which the law imposes a penalty: Sidney v. Sidney, 3 P. Wms. 270, 24 Eng. Reprint, 1060; Scholes v. Hilton, 10 Mees. & W. 15; or that the law has been violated: Savier v. Chipman, 1 Mich. 116; Timson v. Moulton, 3 Cush. (Mass.) 269; Hewlett v. Hewlett, 4

Edw. Ch. (N. Y.) 7; or will be *violated*: Johnson v. Farwell, 7 Me. 370, 22 Am. Dec. 203. Intention to perform act, omission of which would be criminal, presumed: Stark. Ev. 756. Presumptions from confusing accounts: Stuckes v. National Candy Co., 158 Mo. App. 342, 138 S. W. 352. Presumption of citizen's *bona fides*: City of Maysville v. Truex, 235 Mo. 619, 139 S. W. 390. Patents presumed regularly issued: United States v. Iron Silver Min. Co., 128 U. S. 673, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195. When the fact offered in evidence involves *moral delinquency*, not to say criminal offense, it should be strong enough to exclude the presumption of innocence: Corner v. Pendleton, 8 Md. 337. See note, 33 L. R. A., N. S., 837. See Canadian cases in which good faith presumed: Baker v. Societe de Construction Metropolitaine, 22 S. C. R. 364; Ross v. The King, 32 S. C. R. 532; Wright v. Rankin, 18 Gr. 625.

²⁴ Port v. Port, 70 Ill. 484; Bowman v. Little, 101 Md. 310, 61 Atl. 223, 657, 1084.

than guilt and immorality.²⁵ But where the effect of raising a presumption of marriage from cohabitation and repute, although it would exonerate the parties from the charge of immorality in the particular case, would be to involve one of them in an immoral relation with another, or render him or her guilty of a crime, the cohabitation creates no presumption, and is therefore no evidence of marriage when standing alone. If it can be shown that during the continuance, or prior, or subsequent to the cohabitation between the parties, one of them cohabited with another person, the law will not presume that the cohabitation in question was matrimonial, for that would necessarily render the other cohabitation meretricious, unless a legal dissolution of the former cohabitation by death or divorce can be shown before the inception of the latter. As the law cannot in such case presume innocence in one case without rendering one of the parties guilty morally or criminally in another case, it will not presume a marriage from either cohabitation. The authorities on this point are uniform.²⁶ There is also an exception in cases of bigamy, and where damages are claimed for adultery.²⁷ Where a husband separated from his wife and cohabited with another woman, it was presumed in favor of innocence that a divorce had been obtained.²⁸ And where in an action for slander by husband and wife the answer of the defendants stated they had no knowledge sufficient to enable them to form a belief whether the plaintiffs were husband and wife, and it appeared from the evidence that the plaintiff wife had said that previous to her marriage with

²⁵ *Hynes v. McDermott*, 91 N. Y. 451, 459, 43 Am. Rep. 677; *Morris v. Davies*, 5 Clarke & F. 163, 7 Eng. Reprint, 365; *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, 1118; *O'Connor v. Kennedy*, 15 Ont. Rep. 20; *Montgomery v. McLeod*, Ber. (564) 375.

²⁶ *Breakey v. Breakey*, 2 U. C. Q. B. 349, 358; *George v. Thomas*, 10 U. C. Q. B. 604; *Chamberlain v. Chamberlain*, 71 N. Y. 423.

²⁷ *Catherwood v. Caston*, 13 Mees. & W. 261; *People v. Humphrey*, 7 Johns. (N. Y.) 314; *Buchanan v. State*, 55 Ala. 154; *Weinberg v. State*, 25 Wis. 370; *Brown v. State*, 52 Ala. 338; *Commonwealth v. Norcross*, 9 Mass. 492. See note, 89 Am. St. Rep. 193; also § 86 et seq., *post*.

²⁸ *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245. For other illustrations of presumptions of marriage, see note 14 L. R. A. 540-544.

the plaintiff husband she had been married in Germany to another man, it was held that such a statement was entirely consistent with the validity of the marriage *de facto*, which existed between the parties here, and after they had produced their marriage certificate, with proof of cohabitation as husband and wife since its date, the presumption was that the second marriage was a lawful one. There was no proof that her first husband was living, and if there had been, she was still entitled to the charitable presumption that a divorce from her first husband had enabled her to remarry again.²⁹ Where a second marriage is shown in fact, the law raises a strong presumption in favor of its legality, which is not overcome by mere proof of a former marriage, and that the first wife had not obtained a divorce. The husband might have obtained such divorce and become free to contract the second marriage.³⁰ And where a person had married a second time and the issue was whether he had obtained a divorce, it was presumed that the decree had been recorded according to law.³¹ If it is shown that a party to a marriage has contracted a previous marriage and that his or her former spouse is still living, this has been held not to destroy the *prima facie* validity of the second marriage. In such a case it is presumed that the first marriage has been dissolved by divorce, and the burden to show that it has not rests on the person seeking to impeach the last marriage, notwithstanding he is thereby required to prove a negative. Here the presumption of the continuance of the first marriage is made to yield to the presumption in favor of the validity of the second marriage and of the innocence of the parties to it.³² But there is no absolute presumption of law as

²⁹ Klein v. Laudman, 29 Mo. 259.

³⁰ Coal Run Coal Co. v. Jones, 127 Ill. 386, 8 N. E. 865, 20 N. E. 89.

³¹ In re Edwards, 58 Iowa, 431, 10 N. W. 793.

³² Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; Erwin v. English, 61 Conn. 502, 23 Atl. 753; Schmisser v. Beatrice, 147 Ill. 210, 35 N. E. 525; Boulden

v. McIntire, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600; Tuttle v. Raish, 116 Iowa, 33, 90 N. W. 66; Alabama etc. Ry. Co. v. Beardsley, 79 Miss. 417, 89 Am. St. Rep. 660, 30 South. 660; Waddingham v. Waddingham, 21 Mo. App. 609; Hadley v. Rash, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; Gold-

to the dissolution of marriage under such circumstances. Each case must be determined upon its own facts and circumstances and such inferences as should be reasonably drawn from them.³³ There can be no absolute presumption against the continuance of the life of one party to a marriage, in order to establish the innocence of the other party to a subsequent marriage; much less can there be a rigid presumption of a dissolution of the first marriage by divorce, in order to make out such innocence. In all probability there are cases in which the facts and circumstances justify an inference of the death of one party to the first marriage in favor of the validity of the second, and probably there are other cases in which the facts and circumstances justify the inference of a dissolution of the former marriage by divorce. In any particular case, the question must be determined, like any other question of fact, upon a consideration of the attending facts and circumstances, and such inferences as fairly and reasonably flow therefrom. If there are absolutely no circumstances to aid the presumption of the continuance of life or of the continued existence of the former marriage, then the presumption in favor of innocence and of the validity of the second marriage in general should prevail.³⁴

§ 14a (13). Same—English decisions.—It is apparent, then, from the English, as well as the best considered American, cases, that there is no unbending presumption in favor of a second marriage or of the innocence of the parties, but, on the contrary, that the decision of any particular case

water v. Burnside, 22 Wash. 215, 60 Pac. 409. See, also, Bull v. Bull, 29 Tex. Civ. App. 364, 68 S. W. 727. For further discussion, see note to Pittinger v. Pittinger, 89 Am. St. Rep. 198; also "Presumptions as to Marriage," *post*, § 86 et seq.

³³ Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110, full discussion; St. Sure v. Lindsfelt, 82 Wis. 346, 33 Am. St. Rep. 50, 19 L. R. A. 515, 52 N. W. 308. As to alleged divorce in a foreign country,

see note, 89 Am. St. Rep. 204-206. As to the presumption of validity of subsequent marriage, see note in 17 Ann. Cas. 680.

³⁴ Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232, Reynolds v. State, 58 Neb. 49, 78 N. W. 483; Smith v. Smith, 5 Ohio St. 32; Murray v. Murray, 6 Or. 17; Gorman v. State, 23 Tex. 646; State v. Goodrich, 14 W. Va. 834; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110.

must rest on its own attending facts and circumstances. Moreover, it is believed that little force should be given this artificial presumption in order to meet the exigencies of a given case. There appears no intimation in the English cases,³⁵ so far as they have come under our observa-

35 That there can be no inflexible rule in such cases is shown by the English decisions where this question first arose. The leading, and perhaps earliest, case is *Rex v. Twyning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407. The question involved there was whether a female pauper was the wife of Francis Burns. It appeared that some seven years before she had married Richard Winter, with whom she lived a few months, when he went abroad as a soldier, and never thereafter had been heard from. Something over a year after his departure she married Burns. It was held on appeal that the sessions did right in presuming, *prima facie*, that the first husband was dead at the time of the second marriage. In *Rex v. Harborne*, 2 Ad. & E. 540, 111 Eng. Reprint, 209, the respondents having proved the settlement of a female pauper by marriage, it was shown in the answer that the husband was previously married, and that a letter had been written by his first wife, dated twenty-five days before the second marriage. It was held that the sessions were authorized to presume that the first wife was living at the time of the second marriage. Lord Denman, in commenting on *Rex v. Twyning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407, remarked that in that case "this court merely decided that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds. The principle, however, upon which they seemed to have proceeded was

not necessary to that decision. I must take this opportunity of saying that nothing can be more absurd than the notion that there can be any rigid presumption of law on such question of fact without reference to accompanying facts. . . . I think the only questions in such cases are what evidence is admissible and what inferences may fairly be drawn from it." And Lord Littledale added: "All these questions depend upon the facts. There can be no direct evidence as to the fact, unless the party be shown to be alive after the marriage." Again, in *Lapsley v. Grierson*, 1 H. L. Cas. 498, 9 Eng. Reprint, 853, the facts of which are stated in *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110, Lord Campbell said: "We have been much pressed with the case of *Rex v. Twyning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407, but what is there said by Mr. Justice Bayley has been much misunderstood. He who was one of the most learned, accurate and conscientious of judges never laid down what his argument has attributed to him. All that he said was, that there were presumptions of law on both sides, and that as the quarter sessions had come to a conclusion on the facts, the court of king's bench would not say that in fact they had come to a wrong conclusion. In the subsequent case of *Rex v. Harborne*, 2 Ad. & E. 540, 111 Eng. Reprint, 209, Lord Denman intimated a strong opinion that the *onus* of proof lay on the party setting up the marriage." In the later case of *Queen v. Lumley*, L. R. 1 Crown Cas. 196, it appeared that the prisoner was married to one Victor in 1836,

tion, that the dissolution of a former marriage by divorce will be presumed in favor of the validity of a second marriage or of the innocence of the parties to it, although some of the earlier ones have been cited in this country as authority for that proposition. Nevertheless, the authorities affirming this doctrine are numerous, as has already been shown, and it may be considered as settled that such a presumption, in a proper case, may be indulged. However, the presumption of the dissolution of a prior marriage, whether by death or divorce, should be indulged with caution. We apprehend that such presumptions sometimes have been made with very little justification. A rule of law which allows an artificial or technical force to be given evidence, which warrants such presumptions, beyond its natural tendency to convince the mind, and requires courts and juries to presume as true that which probably is false, cannot but be fraught with dangerous consequences. In case there is a conflict of presumptions, it would appear more reasonable that that one should yield which has the least probability to sustain it, rather than

but separated from him in 1843. In 1847 she married Lumley, with whom she lived until 1864. Nothing was heard from Victor from the time she left him. The jury were directed that "there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage." This direction was held erroneous. "In an indictment for bigamy," said Lush, J., "it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day

preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus, the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407, *Rex v. Harborne*, 2 Ad. & E. 540, 111 Eng. Reprint, 209, *Nepean v. Knight*, 2 Mees. & W. 894, appear to us to establish this doctrine." These earlier cases are reviewed and approved in the subsequent case of *In re Phene's Trusts*, L. R. 5 Ch. App. 139, 150.

that the one in favor of innocence and of the validity of the subsequent marriage should prevail.³⁶

§ 15 (14). **Same—As applied to negligence.**—In the question of whether it is negligence not to anticipate the negligence of another, the same presumption plays an important part. That negligence is not to be presumed is a familiar rule, and it is rather to be presumed that ordinary care has been used. “There is a general presumption of law that all men act rightly, until the contrary appears. This presumption is expressed in the maxim, *Omnia prae-sumuntur esse rite acta*. An examination of the cases will disclose that it is applied to *official action*; but it has been also applied to the action of private individuals. If the fullest play were given to the maxim, it would follow that, as every man is presumed to act rightly, every man will be justified in law in acting on the presumption that every other man will act rightly, unless the surrounding circumstances convey to him some indication to the contrary. In this relation, the maxim has a wide but not a universal application. In many situations a man is justified in law in acting on the presumption that other men have acted lawfully, rightly, carefully and properly, until he is in some way admonished to the contrary.”³⁷ The negligence is not presumed; it must be proved. The burden is on the person charging it,³⁸ and he must show that the other party by his act or omission has violated some duty incumbent upon him, and thereby caused the injury complained of.³⁹ It is a sound rule of law that it is not contrib-

³⁶ See *Clayton v. Wardell*, 4 N. Y. 230; *O’Gara v. Eisenlohr*, 38 N. Y. 296; *Northfield v. Plymouth*, 20 Vt. 582, 590.

³⁷ 1 Thompson, *Comm. on the Laws of Negligence*, § 190, and cases there cited.

³⁸ *Schulich v. Mayor etc. of City of Wilmington* (Del. Super. Ct.), 74 Atl. 367; *International & G. N. R. Co. v. Wilson* (Tex. Civ. App.), 129 S. W. 849.

³⁹ *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524, 21 L. Ed. 206; *Weiss v. Pennsylvania Ry. Co.*, 79 Pa. 387; *Lyndsay v. Connecticut Ry. Co.*, 27 Vt. 643; *The Buckeye*, 7 Biss. 23, Fed. Cas. No. 2084; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 Am. St. Rep. 790, and note, 15 Atl. 520; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 50 L. Ed. 564, 26 Sup. Ct. Rep. 303; *Baltimore & Potomac R. Co. v. Landrigan*, 191 U. S. 461, 474, 48 L. Ed.

utory negligence not to look out for danger when there is no reason to apprehend any.⁴⁰ The authorities, indeed, go to the length of stating the rule to be that everyone has a right to presume that others owing a special duty to guard against danger will perform that duty.⁴¹ Thus, it will be presumed that a person stopped, looked and listened before crossing a railway track;⁴² that a workman whose duty it was to load, unload and ride upon an elevator was not necessarily negligent in assuming the safety of such elevator;⁴³ that expressmen, being innocently ignorant of the dangerously explosive contents of a package, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. It not being their duty to know the contents of any package offered to them for carriage, when there are no attendant circumstances awakening their suspicions as to its character, there can be no presumption of law that they have such knowledge in any particular case of that kind, and they cannot accordingly be charged as matter of law with notice of the properties and character of packages thus received.⁴⁴ A passenger on a railway train has the right to assume that its rules will be enforced, and cannot be adjudged guilty of contributory negligence because he relied upon their observance, and omitted a precaution which, but for the existence of the rules, it would have been his duty to take.⁴⁵ Where a purchaser of kerosene that would stand

262, 24 Sup. Ct. Rep. 137. As to presumption of contributory negligence, see note to *Oklahoma City v. Reed*, in 33 L. R. A., N. S., 1085. See, also, note to *Long v. Penn. R. R. Co.*, in 30 Am. St. Rep. 736. See the late case, *Menteer v. Scalzo Fruit Co.*, 240 Mo. 177, 144 S. W. 833 (presumption of care on part of person injured does not raise presumption of negligence against party responsible).

⁴⁰ Beach, *Contrib. Neg.* 41.

⁴¹ *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Grand Rapids etc. R. Co. v. Martin*, 41 Mich.

667, 3 N. W. 173; *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 541, 46 N. W. 21.

⁴² *Baltimore & Potomac R. Co. v. Landrigan*, 191 U. S. 461, 474, 48 L. Ed. 262, 24 Sup. Ct. Rep. 137; *Weiss v. Pennsylvania Ry. Co.*, *supra*.

⁴³ *Mulvey v. Rhode Island Locomotive Works*, *supra*.

⁴⁴ *Parrot v. Wells (The Nitro-Glycerine Case)*, *supra*.

⁴⁵ *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 485, 8 L. R. A. 673, 20 Atl. 2. See, also, the interesting case, *Walker*

an open-fire test of one hundred and twenty degrees, and to whom it was delivered in a vessel marked as purchased, but which contained kerosene that would only stand an eighty-eight degree test, relying on the supposed strength of the oil, tried to kindle a fire with it without negligence and was killed by an explosion which resulted, and which would not have resulted if the kerosene could have stood the one hundred and twenty degree test, it was held in an action by her administrator that the theory that she first poured the oil on the kindling wood and afterward attempted to light it was just as consistent as that she attempted to pour with one hand and at the same time applied a lighted match with the other. If anything, the first supposition was the more reasonable, as it would have been the natural, safe and convenient method of doing the act, and, in the absence of evidence, the presumption was that the deceased observed the ordinary precautions for her own safety.⁴⁶ It is said by courts of first importance that the suggestion that a man of vigorous constitution, sound health and good spirits would commit suicide is so highly improbable as to be unreasonable, and that the natural instinct which leads men in their sober senses to avoid injury and preserve life is of itself an element of evidence to the contrary. There is no presumption of suicide.⁴⁷ Generally, in the absence of proof tending to

v. St. Paul City R. Co., 81 Minn. 404, 51 L. R. A. 632, 84 N. W. 222, where it is held that an intending passenger is entitled to assume that an electric train would stop at a station marked as a stopping place, and, in anticipation of it so stopping to cross in front of it at a spot which would have been free from danger if such train had stopped at the place so marked.

⁴⁶ Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20; McBride v. N. P. R. Co., 19 Or. 64, 23 Pac. 814; Peterson v. Standard Oil Co., 55 Or. 511, 106 Pac. 337.

⁴⁷ Johnston v. St. Louis & S. F. R. Co., 150 Mo. App. 304, 130 S. W. 413; Allen v. Willard, 57 Pa. 374; Meadows v. Life Ins. Co., 129 Mo. 76, 93, 50 Am. St. Rep. 427, 31 S. W. 578; Buesching v. Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Brennen v. Chicago & Carterville Coal Co., 147 Ill. App. 263; Devine v. National Safe Deposit Co., 145 Ill. 322; Modern Woodmen of America v. Kincheloe (Ind. App.), 91 N. E. 976; Modern Woodmen of America v. Craiger (Ind.), 92 N. E. 113. For a case in which the presumption against suicide was rebutted, see Prudential Ins. Co. v. Dolan, 46 Ind. App. 40, 91 N. E. 970,

show the contrary, where a person is killed by an accident to which there are no eye-witnesses, the presumption of the law is that he was in the exercise of due care.⁴⁸ Where death ensued in consequence of a fish-bone having lodged in the rectum, and there was no evidence as to how it came there otherwise than in the ordinary course of nature through the alimentary canal, it was held that if it was likely to cause injury, as the deceased was presumed to have given heed to the instincts of self-preservation, it was not to be inferred that he swallowed the bone voluntarily.⁴⁹

§ 15a (14). Same—Common carriers.—This rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods intrusted to their care have been lost or damaged,⁵⁰ or the goods delayed in delivery.⁵¹ And there is another class of cases against carriers where it is often held that negligence may be inferred from the fact that an injury has happened to a passenger—where a car leaves the track, or a stage-coach is overturned, or where there is a collision between trains belonging to the same company.⁵² Although

⁴⁸ *Adams v. Iron Cliffs Co.*, 78 Mich. 277, 18 Am. St. Rep. 441, 44 N. W. 271; *Van Dorn v. Heap*, 160 Mich. 199, 125 N. W. 11.

⁴⁹ *Jenkins v. Hawkeye Com. Men's Assn.*, 147 Iowa, 113, 124 N. W. 199. See, also, *Stephenson v. Association*, 108 Iowa, 641, 79 N. W. 459; *Tackman v. Brotherhood*, 132 Iowa, 64, 8 L. R. A., N. S., 974, 106 N. W. 350. See, also, the late case, *Norman v. Order of United Com. Travelers*, 163 Mo. App. 175, 145 S. W. 853.

⁵⁰ *Ross v. Hill*, 2 Com. B. 890; *Coggs v. Bernard*, 2 Ld. Raym. 918, 92 Eng. Reprint, 107; *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524, 21 L. Ed. 206; *Philadelphia Ry. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483, 8 L. R. A. 673, 20 Atl. 2, and long note. See notes, *Hendrickson v. Great N. R. Co.*, 16 L. R. A.

261; *Boston etc. R. R. Co. v. Hurd*, 56 L. R. A. 223. See, also, § 183, *post*.

⁵¹ *Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 12 Ann. Cas. 924, 57 S. E. 458.

⁵² *Flannery v. Railway Co., Ir. R.* 11 C. L. 30; *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020; *Skinner v. Railway Co.*, 5 Ex. 787; *Edgerton v. Railway Co.*, 39 N. Y. 227; *Augusta Ry. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Memphis & Ohio Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71, and note; *Smith v. Railway Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, and note; *Miller v. Ocean Co.*, 118 N. Y. 199, 23 N. E. 462; *Feital v. Railway Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Railway Co. v. Blumenthal*, 160 Ill. 48, 43 N. E. 809; *Fleming v. Railway*

if, in proving the injury, facts and circumstances are developed which tend to exonerate the carrier or to charge the plaintiff with contributory negligence, no presumption of negligence arises.⁵³ There is another class of cases in which it is held that where the thing is shown to be under the management of the defendant or his agent, and where an accident in the ordinary course of events does not happen when the business is properly conducted, the accident itself raises a presumption of negligence in the absence of any explanation. The English case where a passer-by in a street was hurt by a barrel of flour falling from a warehouse window is an illustration of this group of cases.⁵⁴ The same principle is illustrated by a New York case, in which it was held that since the owner of a building adjoining the street is under obligation to take reasonable care that the same shall not fall upon the passers-by, if such an accident happens without any proof of explanatory circumstances, negligence will be presumed.⁵⁵ In such cases the facts are said to speak for themselves, *res ipsa*

Co., 158 Pa. 130, 38 Am. St. Rep. 835, 22 L. R. A. 351, 27 Atl. 130; Gleeson v. Railway Co., 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859. See note, 20 Am. St. Rep. 490, above cited, for further illustrations, and cases in note, 15 L. R. A. 35. In Cinn. Railway Co. v. South Fork Coal Co., 139 Fed. 528, 1 L. R. A., N. S., 533, 71 C. C. A. 316, it is laid down that it is the nature of an injurious accident and all the surrounding circumstances which regulate the presumption according to the duty owed by the actor to the injured party, and the question of negligence is always responsive to the fact that if due care had been exercised, the injury would not have been caused; but the fact of the injury alone raises no presumption of negligence: See notes to Edwards v. Manufacturers' Bldg. Co., 2 L. R. A., N. S., 748; Moulton v. Lewiston etc. R. Co., 10 L. R. A., N. S., 850; Brown v. Union Pacific R. Co., 29 L. R. A., N. S., 808.

⁵³ For cases illustrating this subject in case of personal injuries, see Barnowsky v. Helson, 89 Mich. 523, 15 L. R. A. 33, and long note, 50 N. W. 989. See § 184, *infra*.

⁵⁴ Byrne v. Boadle, 2 Hurl. & C. 722; Scott v. London Dock Co., 3 Hurl. & C. 596, 34 L. J. Ex. 220; Kearney v. Railway Co., L. R. 5 Q. B. 411; Faldschneider v. Railway Co., 122 Wis. 423, 99 N. W. 1034. See note to Huey v. Gahlenbeck, 6 Am. St. Rep. 792, and cases; also note to Philadelphia Ry. Co. v. Anderson, 20 Am. St. Rep. 490; also note, 15 L. R. A. 34. As to injuries caused by the explosion of a boiler, see Rose v. Stephens, 21 Am. L. Reg. 522, and note; also note, 15 L. R. A. 35.

⁵⁵ Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. As to the falling of a brick from a railroad bridge, see leading case, Kearney v. Railway Co., L. R. 5 Q. B. 411.

loquitur. But in all such cases the cause of the accident must be clearly connected with the defendant, as being by his act or under his control, before negligence can be presumed.⁵⁶

§ 16 (15). **Effect of the presumption of innocence as to the amount of evidence.**—We have already partially dealt with this subject,⁵⁷ and the qualification of the presumption when applied to civil proceedings. It has been the subject of much discussion as to what degree of evidence is necessary to repel the presumption of innocence in such proceedings. It is perfectly well settled that in criminal actions the commission of a crime must be proved beyond a reasonable doubt. But the authorities are in conflict on the point whether the same rule obtains in civil proceedings. Stephen lays down the English rule very broadly, as follows: "If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond a reasonable doubt."⁵⁸ This doctrine has been questioned in England, but is there sustained by the weight of authority. On the other hand, the decided weight of authority in the United States supports the proposition that in civil actions, although the charge of a crime is to be established, a preponderance of testimony is sufficient.⁵⁹ "In civil cases it should be enough to say that

⁵⁶ Smith, Neg., 2d ed., p. 524. On the applicability of *res ipsa loquitur* in an action for personal injuries from defects in articles manufactured or sold by the defendant, see note to Dail v. Taylor, 28 L. R. A., N. S., 949.

⁵⁷ § 13 et seq., *ante*.

⁵⁸ Reynold's Steph. Ev., art. 94. For further discussion of this subject, see § 195, *post*, and note in Sprague v. Dodge, 95 Am. Dec. 525.

⁵⁹ This has been repeatedly held in *actions on insurance policies*: Blaeser v. Milwaukee Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; Schmidt v. Ins. Co., 1 Gray (Mass.), 529; Aetna Ins. Co. v. Johnson, 11 Bush, 587, 21 Am. Rep.

223; Kane v. Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239; and see note on this subject, Sprague v. Dodge, 95 Am. Dec. 523-525. *For slander and libel*: Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Knowles v. Scribner, 57 Me. 497; Matthews v. Huntley, 9 N. H. 146; Sloan v. Gilbert, 12 Bush, 51, 23 Am. Rep. 708. *For adultery*: Poertner v. Poertner, 66 Wis. 644, 29 N. W. 386. In Riesen v. Riesen, 148 Ill. App. 460, which was an action for divorce, an instruction which told the jury that before they could find the appellee guilty all presumptions of innocence must be overcome by evidence was erroneous. The court said it was too broad. "Single acts of adultery

the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a 'preponderance of evidence' in favor of the demandant's proposition. . . . But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for criminal cases should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. 1. It is sometimes said that, in general, wherever in a civil case *a criminal act is charged* as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated. 2. Nor is such a doctrine better established for individual kinds of cases."⁶⁰ It may be taken, therefore, that the distinction in this country is so well marked as to justify the authoritative proposition that the presumption is applied in all its force in criminal

are not criminal by the law of this state; neither is the charge of adultery, when made for the purpose of obtaining a divorce, a criminal charge. Presumptions of innocence obtain only in criminal cases. In civil cases, to which class the case at bar belongs, the actor must prove his or her case by a clear weight or preponderance of the evidence in order to entitle such actor to prevail." *For a statutory penalty*: Campbell v. Burns, 94 Me. 127, 46 Atl. 812. *For bastardy*: People v. Christman, 66 Ill. 162; Knowles v. Scribner, 57 Me. 495. *For receiving stolen goods*: United States Exp. Co. v. Jenkins, 73 Wis. 471, 41 N. W. 957; and *for negligence and fraud*: Seybolt v. New York Ry. Co., 95 N. Y. 562, 47 Am. Rep. 75; Gordon v. Parrelee, 15 Gray

(Mass.), 413; Jones v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752. In the minority are such cases as Schultz v. Insurance Co., 14 Fla. 73; Butnam v. Hobbs, 55 Me. 227; McConnel v. Ins. Co., 18 Ill. 228; Thurtell v. Beaumont, 1 Bing. 339. See Riggs v. Powell, 142 Ill. 453, 52 N. E. 482, where a distinction is drawn between a "bare" and a "clear" preponderance. On the question whether a suit for a statutory penalty is a civil or criminal prosecution as affecting the necessity for proof beyond a reasonable doubt, see note to State v. Cincinnati, 27 L. R. A. 746. See, also, Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 116 Pac. 298. See the late case, Van Dusen Inv. Co. v. Western Fishing Co. (Or.), 124 Pac. 677.

⁶⁰ Wigmore on Ev., § 2498.

cases only, and has a power, where it arises in civil cases, qualified to the extent indicated.

§ 17 (16). **Presumptions arising from the spoliation or fabrication or suppression of evidence—Things.**—Closely allied with the presumption of innocence are the presumptions which arise against persons who fabricate, suppress or destroy testimony. *Omnia praesumuntur contra spoliatorem.* By such conduct the presumption of innocence may be repelled and overcome. Such conduct may not only be relevant testimony to rebut the presumption of innocence, but may be treated by the jury as evidence of guilt.⁶¹ That this presumption has existed from time immemorial there is abundant proof. Expression of it is found in the Bible, where it is declared, "Cursed be he that removeth his neighbor's landmark." (Deut., c. 27, 17.) Other references will show how the principle has been preserved in every system of laws. The familiar leading case which illustrates the nature of this presumption is that in which the goldsmith wrongfully refused to deliver a valuable jewel which had been left in his possession. The jury were instructed that unless the defendant produced the jewel and thereby showed it to be not of the finest quality, they should find the jewel of the highest value that would fit the socket in which it was placed.⁶² The same rule has been enforced in numerous other cases when a party has by his willful acts rendered it impossible to show the quality or value of the property sued for. In such cases the inference is very strong that the facts suppressed would be unfavorable to the wrongdoer, and the courts have the right to act on such presumption.⁶³ And more broadly if

⁶¹ 1 Greenl. Ev., § 37. See cases cited below. For illustrations of the general subject, see note, 97 Am. St. Rep. 145, and to 34 L. R. A. 581; 1 Smith L. C., 8th Am. ed., 688-690. This is also true where the party intimidates or suborns witnesses: *Keesier v. State*, 154 Ind. 242, 56 N. E. 232; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *United States Brewing Co. v. Ruddy*, 203 Ill. 306, 67 N. E. 799;

McHugh v. McHugh, 186 Pa. 197, 65 Am. St. Rep. 849, 41 L. R. A. 805, 40 Atl. 410.

⁶² *Armory v. Delamirie*, 1 Str. 505, 93 Eng. Reprint, 664.

⁶³ *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241; *Tenton v. Keller*, 167 Ill. 129, 47 N. E. 376; *Robinson v. Union Cent. Life Ins. Co.*, 144 Fed. 1005.

it is shown that a person has attempted to falsify, fabricate, suppress or destroy evidence, such conduct may be justly construed as an indication of his consciousness that his case or defense is lacking merit. And it is only another step to infer that his own belief is well founded.⁶⁴ In the same class are to be found those cases in which a person has refused to submit his goods for examination by the person interested in the disclosure of their condition; and in direct consequence has to carry the burden of the presumption which the refusal raises—that the inspection would reveal a condition unfavorable to the one refusing. In an old Pennsylvania case,⁶⁵ in which the plaintiff sought to recover for building a house for the defendant, the defendant refused him permission to allow an expert to inspect it. Evidence was given of this refusal over the objection of the defendant. The opinion of the court is such a sound exposition of the law relating to the suppression of evidence as to call for embodiment in any work relating to evidence. “Before the trial the plaintiffs sent a person to examine the house, so that he might be able to testify how the work had been done. The witness frankly explained what he came for, and the defendant refused to let him go through the house for such a purpose. The evidence of this transaction was objected to, but the court admitted it. The admission of it is complained of here because it was calculated to prejudice the minds of the jury against the defendant’s cause. Doubtless it would have that effect; and so it ought to have. To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact, must take the consequence of any honest indignation which his conduct may excite. The presumption *in odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is a part of

⁶⁴ *Wilson v. United States*, 162 U. S. 613, 621, 40 L. Ed. 1090, 16 Sup. Ct. Rep. 895; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Commonwealth v. Devaney*,

182 Mass. 33, 64 N. E. 402. See note to *Burgess v. Blake*, in 86 Am. St. Rep. 129.

⁶⁵ *Bryant v. Stilwell*, 24 Pa. 314.

every civilized code. We think this evidence most clearly admissible, and we certainly would not have found fault with the judge if he had gone further and instructed the jury that it afforded some ground for supposing the whole defense to be unfair. It ought to be understood that where one party has the subject matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it, unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the house to as many others as he chose, and overwhelmed the one perjured man by a host of honest ones. I ought to add, however, that such evidence must always be confined strictly to the conduct of the party in and about the very cause in which it is used. It must not only relate to the same subject, but to the same investigation of it; for it is received not on any principle of punitive justice, but on the natural presumption that he withholds the truth because he knows it will make against him, and that no man prefers darkness to light, except because he is conscious that his deeds are evil. If, therefore, the defendant should not refuse an examination for the purpose of the next trial, he cannot be prejudiced by what he did before the last one. It is true, also, that the strength of such a presumption diminishes in very rapid proportion to the time that elapses between the act out of which it rises, and the judicial inquiry which the act was intended to influence." Numerous illustrations might be given when this particular act of suppression has been before the courts, but the rule is so well founded, and has called for so little contrary discussion, that we close this section with the references at foot.⁶⁶

⁶⁶ Refusal to produce a map or plan: *Bryant v. Stilwell*, *supra*; *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349. A rope the breaking of which caused a death: *The Luckenbach*, 144 Fed. 980, where the court said that upon the whole case the conclusion reached was that whatever doubt there was on the question, it should be solved in favor of the libellant, since the ship failed to produce the rope, which was in her possession and which would have settled the question of its safe or unsafe

§ 18 (16). Same—Documents.—The willful destruction, suppression, alteration or fabrication of documentary evidence properly gives rise to the presumption that the documents, if produced, would be injurious to the one who has thus hindered the investigation of the facts.⁶⁷ It is well to recognize that this presumption is founded on the natural inference to be drawn from the fraudulent conduct of the party affected by it, that where in the conduct of his case he has thought it expedient to resort to fraud or deceit to make out his case, he has himself been conscious that on the strength of the case alone he would fail to establish it, or, in other words, that, recognizing the weakness, he can only invigorate it by the deceit of making and adding to it false testimony, or, by lopping off and suppressing the malignant parts, cause it to present a healthy appearance before a tribunal. The one inference leads to the other, and the fact of his endeavor fraudulently to alter the features suggests quite naturally the weakness of the

condition, and whether it broke, or was new and inflexible, and became untied, thus causing the accident. A defective "tongue" in an automatic railway coupling, the cause of an accident: *Galveston etc. Ry. Co. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 993, in which the court said: "All uncertainty as to the condition of the tongue of the coupling apparatus might have been removed by an exhibition of it in court, but appellant, although notified by appellee to produce it in court, chose to suppress its silent but forcible testimony. No reason or explanation is offered for the failure to produce the broken appliance, although it was shown to be in its possession. The appliance was the best evidence of its condition, and if it had been produced in court, it could have been ascertained whether it had any defect, and if so whether it was one in construction or that supervened afterward. Appellant had that evidence and failed and refused to introduce it, or to give any expla-

nation of its failure to do so, and the presumption arises that the appearance of the broken tongue would not have benefited appellant": *Underwood v. Coolgrove*, 59 Tex. 164; *Welsh v. Morris*, 81 Tex. 159, 26 Am. St. Rep. 801, 16 S. W. 744.

⁶⁷ In case of deeds: *Dalston v. Coatsworth*, 1 P. Wms. 731, 24 Eng. Reprint, 589. Of account books: *Sheils v. West*, 17 Cal. 324. Or corporate records: *Riggs v. Penn. Ry. Co.*, 16 Fed. 804; and other documents: *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376; *Murray v. Lepper*, 99 Mich. 135, 57 N. W. 1097; *The Olinde Rodrigues*, 174 U. S. 510, 528, 43 L. Ed. 1065, 19 Sup. Ct. Rep. 851; *Joannes v. Bennett*, 5 Allen (Mass.), 169, 81 Am. Dec. 738; *Sullivan v. Sullivan*, 188 Mass. 380, 74 N. E. 608; *Missouri etc. R. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188; *Westervelt v. Nat. Mfg. Co.*, 33 Ind. 18, 69 N. E. 169; *Johnson v. Marx Levy*, 109 La. 1036, 34 South. 62.

cause itself. His own conduct has so branded it. The general principle applies to all these forms of fraud, and a recognized authority in classifying them says: "They admit all forms of personal falsification by the party in the course of litigation; the fabrication or manufacture of evidence, by forgery, bribery, subornation and the like; the suppression of evidence, by intimidation, eloignement or concealment of witnesses or material objects, or by the destruction or spoliation of documents or other material objects."⁶⁸ Dealing with this fraudulent treatment of documents there need be no attempt to ameliorate the lot of the party offending. He is entitled to no sympathy or consideration. He has under the thin disguise of conducting his cause in his own way committed a moral offense at the least, and in graver cases a criminal one, in his attempt to blind the eyes of the court from seeing what they should see on the adjudication of his case. In some cases it has been contended that when the spoliation is once shown, it should be assumed that the contents of the documents are what is alleged by the other party.⁶⁹ But it may well be questioned whether the presumption should be carried to this extent. Doubtless the wrongful act is a circumstance from which the jury may draw the most unfavorable inference against the wrongdoer. Such act may throw suspicion on all the other evidence produced by him.⁷⁰ And it will prevent him from proving the contents of the documents destroyed by any other evidence.⁷¹ But the presumption arising from such acts does not entirely dispense with proof by the adverse party.⁷² Where a deed, a will or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption *in odium spoliatoris* applies in favor of the

⁶⁸ Wigmore on Ev., § 278.

⁶⁹ *Barker v. Ray*, 2 Russ. 72, 38 Eng. Reprint, 259.

⁷⁰ Best, Ev., 10th ed., § 413.

⁷¹ *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126, and note; *Joannes v. Bennett*, 5 Allen (Mass.), 169, 81 Am. Dec. 738; *Price v. Tallman*, 1 N.

J. L. 447. See § 222, *post*, and *Moulton v. Mason*, 21 Mich. 364.

⁷² *Askew v. Odenheimer*, 1 Bald. (U. S.) 380, Fed. Cas. No. 587; *Bott v. Wood*, 56 Miss. 136; *Merwin v. Ward*, 15 Conn. 377; *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428; *F. R. Patch Mfg. Co. v. Machinists*, 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74.

party who 'claims under such paper, though the contents are not proved. "The fact of spoliation, suppression, or embezzlement may be proved by the answer or oath of the opposite party; so may the contents of the paper; the same rule applies to matters of account; the mere embezzlement of books or accounts is sufficient to authorize a rejection of claims by the spoiler though supported by evidence, or the party spoiled may rebut the claim by his oath. But where he comes to charge the spoiler in account, in order to raise a debt against him, he must give some evidence beyond the fact of spoliation, his oath would be admissible evidence, its effect depending on the circumstances of the case. If he relies on other evidence, he must make out a *prima facie* case, by proof competent for a court of equity to presume, a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favor of the charge set up. This is what is understood by some evidence, it may be slight, yet if it conduces to prove the charge it is legally sufficient, its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation; herein the rule differs from that which applies to a claim of property under a deed or will on which the right depends, and the thing claimed is ascertained." 73

§ 18a (16). Same — Documents — Evidence of.—As we have shown at the end of the last section, while the avenging presumption which the spoliator or suppressor has raised against himself is the forerunner of dire consequences, the law is merciful, in that it calls upon the adverse party for some evidence of the contents. If a person is proved to have destroyed a written instrument, the presumption that if the truth had appeared, it would have been against his interest, is unquestionable, and accordingly slight evidence of the contents of the instrument will usually, in such a case, be sufficient.⁷⁴ Parol evidence may be given by him of the contents of the document.⁷⁵ And

⁷³ Askew v. Odenheimer, *supra*.

⁷⁴ Broom's Max. 940.

⁷⁵ Cowper v. Cowper, 2 P. Wms. 748, 24 Eng. Reprint, 930; Jones v. Murphy, 8 Wils. & S. 275.

such evidence, when supported by the presumption that the contents of the paper were adverse to the spoliator, may be very slight and still support a judgment, though it might be wholly unsatisfactory standing alone.⁷⁶ Though the secondary evidence thus given is imperfect, vague and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence.⁷⁷ The rule is that the party in such a case may give secondary or parol proof of the contents of such books or papers, if they are shown or admitted to be in the possession of the opposite party; and if such secondary evidence is, as we have said, vague, the party in default must suffer the consequences. Some general evidence, nevertheless, of such parts of them as are applicable to the case must first be given before any foundation is laid for any inference on account of their nonproduction.⁷⁸ The suppression of documents called for is not an admission that they would prove what is claimed respecting their contents. It is merely a circumstance warranting a strong inference against the party. There must be some other evidence in support of the claim. A *prima facie* case must be made, and, when made, and there is rebuttal evidence casting a doubt upon the question of fact in controversy, the act of the party withholding evidence is taken strongly against him, and sustains the position of the plaintiff.⁷⁹

§ 19 (17). Presumptions from withholding evidence.— These expressions of opinion are with reference to papers suppressed or destroyed, and are to be construed proportionately less severely in the case of documents merely withheld. The withholding or failing to produce evidence, which, under the circumstances, would be expected to be

⁷⁶ Jones v. Knauss, 31 N. J. Eq. 609; Rector v. Rector, 3 Gilm. (Ill.) 105; Harden v. Hesketh, 4 Hurl. & N. 175; Roe v. Harvey, 4 Burr. 2484, 98 Eng. Reprint, 302; Sutton v. Dav-
enport, 27 L. J. C. P. 54.

⁷⁷ Thayer v. Middlesex Ins. Co., 10 Pick. (Mass.) 329.

⁷⁸ Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., of New York, 7 Wend. (N. Y.) 31.

⁷⁹ Stout v. Sands, 56 W. Va. 663, 49 S. E. 428.

produced, and which is available, gives rise to a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable.⁶⁰ Said Lord Mansfield: "It is certainly a

⁶⁰ *Crescent City Ins. Co. v. Ermann*, 36 La. Ann. 841; *Oliver v. Synhorst*, 58 Or. 582, 109 Pac. 762, 115 Pac. 594; *Lake Forest Water Co. v. City of Lake Forest*, 154 Ill. App. 184, 249 Ill. 382, 94 N. E. 517; *Eldridge v. Terry etc. Co.*, 145 App. Div. 560, 129 N. Y. Supp. 865; *Lauer v. Banning*, 152 Iowa, 99, 131 N. W. 783; *Reuken v. Chicago etc. R. Co.*, 156 Ill. App. 65; *Bryant v. Lazarus*, 235 Mo. 606, 139 S. W. 558; *Warren v. Warren*, 33 R. I. 71, 80 Atl. 593; *General Electric Co. v. Allis Chalmers Co.* 190 Fed. 145; *Power v. Grogan*, 232 Pa. 387, 81 Atl. 416; *Cross v. Bell*, 34 N. H. 82; *State v. Rodman*, 62 Iowa, 456, 17 N. W. 663; *Rice v. Commonwealth*, 102 Pa. 408; *Connecticut Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; *The Ville Du Havre*, 7 Ben. (U. S.), 328, Fed. Cas. No. 16,943 (failure to call seamen in charge of light at time of collision); *Danner v. South Carolina Ry. Co.*, 4 Rich. (S. C.) 329, 55 Am. Dec. 678 (failure to call persons in charge of train at time of accident); *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. 176 (failure to call attending physician when defendant cannot call him); *The New York*, 175 U. S. 187, 44 L. Ed. 126, 20 Sup. Ct. Rep. 67 (failure to call officer in charge at time of collision); *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157 (failure to call a witness whose acts were the subject of inquiry); *Robinson v. Union Cent. Life Ins. Co.*, 144 Fed. 1005 (failure to produce application, entries upon which

were in dispute); *The Luckenbach*, 144 Fed. 980 (failure to produce rope whose defective condition was in question); *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349 (failure to produce map); *Wilson v. Griswold*, 79 Conn. 18, 83 Atl. 659 (failure to produce lease, terms of which were in question); *People v. Hovey*, 92 N. Y. 554 (objection to testimony of wife); *Brown v. Schock*, 77 Pa. 471, (refusal of plaintiff to appear when his identity is in issue); *Cole v. Lake Shore Ry. Co.*, 95 Mich. 77, 54 N. W. 638 (failure to testify when plaintiff has exclusive knowledge); *Bryant v. Stillwell*, 24 Pa. 314 (failure to produce plans for examination); *Clark v. Miller*, 4 Wend. (N. Y.) 628 (refusal of bailee to give amount received for goods). For further illustrations of the general subject, see 14 L. R. A. 470; 1 Smith L. C. 374; also note to *Armory v. Delamirie*, 1 Str. 505, 93 Eng. Reprint, 664. In an excellent note in 34 L. R. A. 581, on the subject, appended to the case of *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, the subject is well divided into the three classes: 1. When a party fails to produce evidence after demand or notice by the party entitled to the production thereof. 2. When a party fails to introduce documentary (the "best") evidence which would properly be a part of the case. 3. When a party adversely interested destroys or withholds evidence to which the adversary is entitled. Under the

maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.”⁸¹ It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead

first head the writer has given the leading case of the chimney sweep's jewel, *supra*, § 17; *Armory v. Delamirie*, 1 Str. 505, 93 Eng. Reprint, 664, 1 Sm. Lead. Cases, 7th Am. ed., 636, as done into English in London in 1876: "And seeing by this wickedness the stone was made away and his worth known to none, Craftsmen then came to show by weight and tale what gems of best and uttermost avail might in the compass of that ring be laid, with no less damage it should be paid; For what man bideth in wrong doing. Against him the law deemeth everything." Additional instances are there cited. Among them are *Bowles v. Stewart*, 1 Sch. & Lef. 209 (complete suppression held equivalent to spoliation); *Bryant v. Stillwell*, 24 Pa. 314 ("To smother evidence is not much better than to fabricate it. A, who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact, must take the consequences of any honest indignation which his conduct may excite"); *Winchell v. Edwards*, 57 Ill. 41 (fabrication of a receipt: "The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such practice, not less than when evidence has been suppressed or withheld": 1 Phil. Ev., 4th Am. ed., 639); *Riggs v. Pennsylvania & N. E. R. Co.*, 16 Fed. 804 (suppression of a minute-book); *Hall v. Vanderpool*, 156 Pa. 152, 26

Atl. 1069; *Thompson v. Shannon*, 9 Tex. 536 (failure to call a witness); *Page v. Stephenson*, 25 Mich. 357 (withholding books of account); *Symington v. McLin*, 1 Dev. & B. L. (N. C.) 291 (failure to produce a note). In the following cases, also, the presumption is dealt with: *Attorney General v. Dean & Canons of Windsor*, 24 Beav. 679, 53 Eng. Reprint, 520; *Roe, Haldane v. Harvey*, 4 Burr. 2484, 98 Eng. Reprint, 302; *Livingston v. Newkirk*, 3 Johns. Ch. 315; *Rex v. Countess Arundel*, Hob. 109, 80 Eng. Reprint, 258; *Dalston v. Coatsworth*, 1 P. Wms. 731, 24 Eng. Reprint, 589; *Cowper v. Earl Cowper*, 2 P. Wms. 720, 24 Eng. Reprint, 930; *Cookes v. Hellier*, 1 Ves. Sr. 234, 27 Eng. Reprint, 1003; *Twyman v. Knowles*, 13 Com. B. 222, 22 L. J. C. P., N. S., 143, 17 Jur. 238; *Harden v. Hesketh*, 4 Hurl. & N. 175, 28 L. J. Ex., N. S., 137 (nonproduction of a lease); *James v. Biou*, 2 Sim. & St. 600, 4 L. J. Ch., N. S., 202, 57 Eng. Reprint, 475.

⁸¹ *Blatch v. Archer*, 1 Cowp. 66, 98 Eng. Reprint, 969. See the late cases, *Astruc v. Star Co.*, 193 Fed. 631; *Jenner v. Shope*, 205 N. Y. 66, 98 N. E. 325; *Bonelli v. Burton*, 61 Or. 429, 123 Pac. 37; *D'Addio v. Hinckley Rend. Co.* (Mass.), 100 N. E. 647; *Judy v. Jester* (Ind. App.), 100 N. E. 15; *Tegels v. Great Northern R. Co.* (Minn.), 138 N. W. 945; *Consolidated Coal Co. v. Knickerbocker Steam Towage Co.*, 200 Fed. 840.

of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion.⁸²

While it might be eminently desirable to enforce a draconic measure of punishment where evidence is withheld, the courts adhere to the qualified presumption, and call first for some general evidence, rather than permit an unrestrained account of the contents. That slight evidence is so little, however, that the offending party is in reality punished almost to the extent deserved. In one of the cases cited,⁸³ the court said that the correct law on the subject was, that where evidence was susceptible of two interpretations, and it was in the exclusive power of one party to show exactly what the truth was, from the fact that the party failed to produce this evidence, the jury might presume that any such evidence, if produced, would be unfavorable to the party who might so have produced it. The presumption may be used to throw light on the evidence already in; not to make evidence. In other words, some general evidence having been given of the existence of such evidence, the presumption from its being withheld arises at the call of the party alleging its nonproduction to his prejudice.

§ 19a (17). Same—Refusal to permit corporal inspection.—Apart altogether from the question of the power of

⁸² *Gulf etc. R. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454. Thus in *Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, Ann. Cas. 1912D, 1246, 138 S. W. 316, a widower sued on an accident policy on his late wife's life. Facts were given in evidence by the company showing that he had considerable knowledge concerning her death. He did not testify. He had testified on a former trial and there was elicited from him an avowal of his conjugal infidelity. It was proper to charge the jury that the unfavorable presumption existed against him for such failure. It was not a sufficient rebuttal that he feared the humiliation. See, also, *A. B. Dick Co. v. Belke*, 86 Fed. 149;

Société etc. v. Allen, 90 Fed. 815, 33 C. C. A. 282; *Dickinson v. Bentley*, 80 Iowa, 842, 45 N. W. 903; *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631. In the last-named case, Appleton, J., said: "The defendant does not offer his own testimony. He prefers the adverse inferences, which he cannot but perceive may be drawn therefrom to any statements he could truly give, or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged, by the oath, to give."

⁸³ *Robinson v. Union Cent. Life Ins. Co.*, 144 Fed. 1005.

the court to compel, in the interests of justice, a corporal exhibition of a party to the action,⁸⁴ the refusal to permit it must, in actions for personal injuries,⁸⁵ and in those cases which in the discretion of the court call for such production,⁸⁶ undoubtedly raise the presumption that the disclosure would be detrimental to the cause of the party refusing. This presumption rests rather on the broad basis of the duty owed to the state of bringing before the tribunal the facts, so that the whole truth of the matter in debate may be elicited, and the exercise of the court's discretion would form ample protection to the party both on the grounds of necessity and decency. If the presumption arises from the nonproduction of things,⁸⁷ *a fortiori* it must appear when the "thing" is a part of the body of a party to the suit. "If a person, by virtue of his very existence in civilized society, owes a duty to the community to disclose, for the purposes of justice, all that is in his control which can serve the ascertainment of the truth, this duty includes equally the mental impressions preserved in his brain, the documents preserved in his hands, the corporal facts existing on his body, and the chattels and premises within his control. There can be no discrimination. The latter forms of disclosure, though more rarely asked for, are not a whit the less necessary or proper. They are included in the general duty."⁸⁸ In a case in which the defendant was charged with a violation of the election law, the government charged that he wrote certain names improperly on the registration book; and offered testimony to estab-

⁸⁴ See *post*, c. 13, "Real Evidence."

⁸⁵ See *post*, c. 13, "Real Evidence."

⁸⁶ *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 172, 104 Am. St. Rep. 863, 1 Ann. Cas. 261, 64 L. R. A. 494, 77 S. W. 403; *International & G. N. R. Co. v. Butcher* (Tex. Civ. App.), 81 S. W. 819; *Kinney v. Springfield*, 35 Mo. App. 97; *Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155, 83 Am. St. Rep. 269, 52 L. R. A. 328, 58 N. E. 686; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000; *Peoria, D.*

& E. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; *Louisville & N. R. Co. v. McLain*, 23 Ky. Law Rep. 1878, 66 S. W. 391. In *Chicago B. & Q. R. Co. v. Reith*, 65 Ill. App. 461, it was held that where there were no real grounds for seeking the examination and where no secret malady was alleged, the court was justified in refusing an application for a corporal examination.

⁸⁷ See § 17, *ante*.

⁸⁸ *Wigmore, Ev.*, § 2194.

lish that fact. The defendant went on the witness-stand and swore he did not write those names in that book. The government, on cross-examination, called on him to take a pen and write the names, and, over the objection of his counsel, the writing was admitted in evidence and the jury permitted to compare it with the book. Brewer, J.,⁸⁹ said: "Supposing, in any civil case, a witness testifies that he did make a particular writing, would not it be germane to that matter to show that he could not write at all; to give him a pen, and have him show before the jury that he either could not write at all, or that his writing was so completely variant from that in question that it was utterly impossible that he could have written it? Surely, the two matters are connected as closely as two things can be; and it would be conclusive against the testimony of any witness that he had written a certain writing, if it appeared from his own demonstration before the jury that he could not write at all, or that his handwriting was completely variant from that question. Then the other phase is, whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a courtroom that witnesses are often called upon either for some exposure of their person, or to do some physical act supporting or contradicting their direct testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true and the test accurate. A person who testifies as to his physical condition may be compelled, there being no improper exposure of person, to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he never was wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or not there was a scar or mark of wound on his arm."

⁸⁹ United States v. Mullaney, 32 Fed. 370, 371.

Whatever doubt may have existed as to the power of the court in such cases, there need be none as to the duty of the party under circumstances which warrant the demand for the evidence; and, if the duty exists, the complementary presumption arising from a refusal is simultaneously called into being. The party may have a right to submit or refuse, and in case he should refuse, the opponent is entitled to have that fact go to the jury to be considered by them in determining upon the credibility and sufficiency of the testimony upon which he seeks to recover.⁹⁰ While the trend of the authorities seems to be toward a limitation of the right to inspection to personal injury causes, there can be little harm in extending it to cases generally, subject to the allowance by the court, in its discretion, of the application. It goes without saying that the discretion would not be exercised in permitting examination in actions of defamation imputing want of chastity and the like.⁹¹ It is axiomatic that in those cases in which the refusal to submit to examination is supported by the court, no presumption from the party's refusal can possibly arise.⁹²

⁹⁰ *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000.

⁹¹ In an action for slander in saying of a woman that she had been guilty of fornication, she will not be compelled to submit to a physical examination, when she denies having had intercourse with any man: *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; and similarly where the purport of the slander charged was that the plaintiff was a whore, had become pregnant, and suffered an abortion to be performed upon her: *Kern v. Bidwell*, 119 Ind. 226, 12 Am. St. Rep. 409, 21 N. E. 664.

⁹² The following extract from one of the late A. C. Freeman's monographic notes in the *American State Reports*, Cleveland etc. Ry. Co. v. Huddleston, 151 Ind. 540, 68 Am. St. Rep. 238, 36 L. R. A. 681, 46 N. E.

678, will be found of interest: "Without going at length into the reasoning and historical research with which the matter has been argued on both sides, it seems to us that the reasoning of the majority of the courts is most conclusive, and their decisions the best advised. Great respect is due to the holding of the supreme court of the United States in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000, but the force of its conclusion is much diminished by the dissenting opinion from which quotation has been made herein. The doctrine that a court has power, within its sound discretion, to order the physical examination of a plaintiff in an action based upon personal injuries, is supported by strong reasons of analogy and public policy. It is an extension of the rule requiring

§ 20 (17). **Same—Refusal to produce.**—Just as the failure to give or produce evidence according to natural expectation raises the presumption dealt with in the preceding section, so the refusal to produce material documentary evidence, by a party who is able to produce it, raises presumptions against him founded on the reasons which probably actuated his withholding documents after being called upon to produce them. In such cases the inferences are to be taken, in connection with the proof, most strongly against him. Where the case depends on the contents of documents, it has been held dangerous and improper to dispense with their scrutiny, and every presumption of bad

the production of the best evidence. It is analogous to the power of courts to compel a discovery of papers and documents constituting material evidence in causes before them. Nor does it involve the invention of new and inquisitorial methods of securing evidence, because the power of courts to compel parties to submit their persons to examination, when necessary to the ends of justice and of public welfare, is almost as old as the law itself. The argument that it involves a violation of the right to personal liberty and privacy, that in its application the sensibilities of refined and delicate women will be shocked and their dignity trespassed upon, has little force, and is based upon considerations which are purely sentimental. Much may safely be intrusted to the discretion of the the courts, and in their hands these rights and sensibilities will be properly safeguarded, and will yet, as they should, be held subordinate in importance and sacredness to the interests of justice. At the basis of the disagreement of courts upon this question is a difference in their conception of the function and meaning of a trial. A trial is not "a combat in which each of the gladiators is permitted, within certain limits, to

deceive and trick the antagonist and umpire," but its object is "to enable the state to establish and enforce justice between party and party": Thompson on Trials, sec. 859. The conclusion of the weight of authority may be placed upon the higher ground that when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done: *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 721, 14 Am. St. Rep. 190, 3 L. R. A. 808, 9 S. E. 602; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 19 L. R. A. 641, 54 N. W. 757. Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice: *Schroeder v. Chicago etc. Co.*, 47 Iowa, 375.

faith in the possessor must be made when they are so withheld.⁹³ In such cases, after due notice to produce has been given, the rule is not, that a party has a right to infer, from the refusal of his adversary to produce books or papers which may have been called for, that if produced they would establish the fact which he alleges they would prove. The true rule is, that the party in such a case may give secondary or parol proof of the contents of such books or papers, if they are shown or admitted to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain, as to dates, sums or boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. But they must be shown to be in his possession, and some general evidence of such parts of their contents as are applicable to the case must first be given, before any foundation is laid for any inference or intendment on account of their nonproduction.⁹⁴ It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.⁹⁵ It is certainly a maxim, said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have

⁹³ *Haldone v. Harvey*, 4 Burr. 2486; *Barber v. Lyon*, 22 Barb. (N. Y.) 622; *Page v. Stephens*, 23 Mich. 357; *Reavis v. Orenshaw*, 105 N. C. 369, 10 S. E. 907; *Attorney General v. Halliday*, 26 U. C. R. 397; *Lowell v. Todd*, 15 C. P. (Ont.) 306; *Briggs v. McBride*, 1 P. & B. (New Brk.) 663.

⁹⁴ *Life Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31; *Doe d. McGuire v. Dennis*, 2 O. S. (Ont.) 589.

⁹⁵ *Kirby v. Tallmadge*, 160 U. S. 379, 383, 40 L. Ed. 463, 16 Sup. Ct.

Rep. 349; *Gulf etc. Ry. Co. v. Ellis*, 10 U. S. App. 640, 54 Fed. 481, 4 C. C. A. 454, 456; *Missouri K. & T. Ry. Co. v. Elliott*, 102 Fed. 96, 52 C. C. A. 188; *McDonough v. O'Niel*, 113 Mass. 92; *Morrow v. Missouri Pac. R. Co.*, 140 Mo. App. 200, 123 S. W. 1030. See, also, *Witherspoon v. Duncan* (Tex. Civ. App.), 131 S. W. 660; *King v. Will J. Block Amusement Co.*, 115 N. Y. Supp. 243; *Pfaelzer v. Gassner*, 116 N. Y. Supp. 15; *Varnado v. Banner Cotton Oil Co.*, 126 La. 590, 52 South. 777.

produced and in the power of the other side to have contradicted.”⁹⁶ Starkie says: “The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasions for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.”⁹⁷ It has been frequently attempted to limit the effect of the nonproduction of documents in respect of which notice to produce has been given, and thus to exclude the presumption which we have shown arises on the willful omission, and that the true rule should be that the mere nonproduction of books or documents should have no other legal effect than to allow the other party to prove their contents by parol, unless under special circumstances.⁹⁸ The weight of authority, however, sustains the view that the court may properly instruct the jury—that they may presume that the evidence withheld would have operated unfavorably to the one refusing to produce it.⁹⁹ The doctrine laid down in Pothier¹⁰⁰ is good law to-day: “That if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of that party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may

⁹⁶ *Blatch v. Archer*, Cowp. 63, 65.

⁹⁷ 1 Starkie on Evidence, 54.

⁹⁸ See cases above cited and also § 222 et seq., *post*.

⁹⁹ *Copperthite v. Loudoun Nat. Bank* (Va.), 68 S. E. 392; *Reiter v. Ziegler*, 121 N. Y. Supp. 324; *Johnston v. McKenna*, 76 N. J. Eq. 217, 74 Atl. 284; *Aetna Indemnity Co. v. G. A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369; *Norguet v. Paramount Worsted Mills*, 177 Fed. 970; *The M. E. Luckenbach*, 174 Fed. 265; *Moore v. Adams*, 26 Okl. 48, 108 Pac. 392; *Star Mills v. Bailey*, 140

Ky. 194, 130 S. W. 1077; *Sherman v. Southern Pac. Co.* (Nev.), 111 Pac. 416; *Johnston v. St. Louis & S. F. Ry. Co.*, 150 Mo. App. 304, 130 S. W. 413; *Kimball v. O'Dell & Eddy Co.*, 138 App. Div. 409, 122 N. Y. Supp. 755; *McClanahan v. St. Louis & S. F. R. Co.*, 147 Mo. App. 386, 126 S. W. 535; *Atchison etc. R. Co. v. Davis*, 26 Okl. 359, 109 Pac. 551; *Thayer v. Middlesex Ins. Co.*, 10 Pick. (Mass.) 329; *Jackson v. McVey*, 18 Johns. (N. Y.) 330; *Ransford v. Bosanquet*, 1 Q. B. 814.

¹⁰⁰ 2 Evans' Pothier, 149.

well be presumed that if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.”¹ This is the full length of the rule, and the presumption stops short of the proposition that books and papers, if produced, would establish the fact which the adversary alleges they would prove; and this presupposes in every case that the party is in a position to produce them and will not do so. And where he is in such position, but awaits the consent of his adversary to the production, the presumption does not arise.² Where secondary evidence is given by the party who gave notice to produce, such evidence cannot be rebutted by the production of the books or documents originally withheld. The one who has withheld the testimony is not allowed to take advantage of his own wrong, and he can only use the books or documents by the consent of the other party. Where the plaintiff, the possessor of an alleged libelous letter, voluntarily destroyed it and was permitted to testify concerning its contents, the doctrine of *contra spoliatorem omnia praesumuntur* applied. In the absence of proof that the destruction was the result of accident or mistake, or of other circumstances rebutting any fraudulent design, the inference is that the purpose was fraudulent, and the party should be excluded from offering secondary evidence to prove the contents. If such were not the rule, great opportunities for the grossest frauds would be afforded.³ It must be borne in mind that the presumption cannot be used to relieve the adversary from the *onus* of proving his own case.⁴

§ 21 (18). **Same—Qualification of the rule.**—It follows from what appears in the preceding section, that if the

¹ Clifton v. United States, 4 How. (U. S.) 242, 11 L. Ed. 957.

² Cartier v. Troy Lumber Co., 138 Ill. 533, 14 L. R. A. 470, 23 N. E. 932.

³ The Count Joannes v. Bennett, 5 Allen (Mass.), 169, 81 Am. Dec.

738; Kingman v. Tirrell, 11 Allen (Mass.), 97; Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547; Tyng v. U. S. Submarine Co., 1 Hun (N. Y.), 161; Doe v. Hodgson, 12 Adol. & E. 135. See, also, § 222, *post*.

⁴ Gage v. Parmelee, 87 Ill. 343.

failure to produce the document is accounted for by the fact that it is not under the control of the one failing to produce it, no adverse presumption can arise against him in that regard.⁵ As with the suppression or nonproduction of documents, so with witnesses. Where a witness has been summoned by both parties and attends at the trial, and is not put upon the stand by either side and does not testify in the case, it would be erroneous to raise the presumption against either one side or the other, for it would weigh equally against each.⁶ But where the witness has not been summoned by, though available to, both parties, the presumption is against him who would have been most favored by the testimony of that witness.⁷ Where a witness, on account of his situation or relations, would be hostile, the presumption does not arise. The failure to call as a witness an alleged accomplice should not be regarded as a circumstance against the accused. A degree of discredit is cast by the state upon the accomplice by accusing him of a crime, and the defendant might well conclude that his testimony would have but little weight. The accused may in fact be innocent and the accomplice guilty. Under such circumstances the accused might be greatly prejudiced if he should call his codefendant, who might shield himself at the expense of the other party.⁸ But when there is no suggestion of hostility, the fact of an actual witness of an occurrence not being called when he is within reach has been held unfavorable to the party not calling him. In an action

⁵ *First Nat. Bank v. Hyland*, 6 N. Y. Supp. 87, 53 Hun, 108; *State v. Buckman*, 74 Vt. 309, 52 Atl. 427; *Gilbert v. Ross*, 7 Mees. & W. 121.

⁶ *Haynes v. McRae*, 101 Ala. 318, 13 South. 270; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Scovill v. Baldwin*, 27 Conn. 316; *Peetz v. St. Charles Ry. Co.*, 42 La. Ann. 541, 7 South. 688; *Cross v. Lake Shore Ry. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361; *Diel v. Missouri Pacific Ry. Co.*, 37 Mo. App. 454; *Bleecer v. Johnson*, 69 N. Y. 309;

Mooney v. Holcomb, 15 Or. 639, 16 Pac. 716; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095; *Erie R. Co. v. Kane*, 118 Fed. 223, 55 C. C. A. 129; 1 Greenl. Ev., 16th ed., § 1956; *Whart. Ev.*, § 1207. See the late cases: *Cullum v. Colwell*, 85 Conn. 459, 83 Atl. 695; *Rump v. Woods* (Ind. App.), 98 N. E. 369.

⁷ *Zimmerman v. Zimmerman*, 149 Ill. App. 231.

⁸ *State v. Cousins*, 58 Iowa, 250, 12 N. W. 281.

by a traveler on a public street for injuries by the alleged negligence of defendant's motoneer in operating one of its cars, the defendant having omitted to call him as a witness, although within reach and available, the court was, under the circumstances, justified in instructing the jury, that in weighing the effect of the evidence actually introduced, they were at liberty to presume that the testimony of the motoneer, if introduced, would not have been favorable to the cause of the defendant.⁹ In another case it was properly ruled, as to the production of witnesses who knew about the facts in issue, that if there was evidence to rebut the evidence of the government which might be furnished by witnesses other than the defendant, and if the evidence against the defendant was such that he would naturally be expected to call them, his failure to do so would be a circumstance which might be considered by the jury, and given such weight and significance as they thought it entitled to, and from which they might infer, if they thought the inference warranted and a reasonable one, that such witnesses would testify unfavorably to the defendant, but that, unless it appeared that such witnesses were within the defendant's control and could be procured by him, the jury were to give no significance whatever to his failure to call them.¹⁰ Where the testimony would be simply cumulative, it does not amount to an omission to produce the best evidence alone, and the mere omission of a party to a civil action to call a witness, who, at the most, has no other or better knowledge of the matter in dispute than those who are produced and give evidence, is not necessarily suspicious, entitling the adverse party to any presumption to his prejudice.¹¹ Where testimony not given is privileged, such as that of an attorney in respect to confidential communications, a person who refuses to allow his attorney to violate the confidence of the professional relation cannot be regarded

⁹ *Fonda v. St. Paul City Ry. Co.*,
71 Minn. 438, 70 Am. St. Rep. 341,
74 N. W. 166.

¹⁰ *Commonwealth v. McCabe*, 163
Mass. 98, 39 N. E. 777.

¹¹ *Bleecker v. Johnston*, 62 N. Y.
309.

in the odious light of one willfully suppressing evidence. The law has so great a regard for the preservation of the secrecy of this relation that even the party himself cannot be compelled to disclose his own statements made to his attorney with reference to professional business.¹² Objecting to evidence about to be given by the adversary has been stigmatized as raising the presumption to the prejudice of the party objecting. A court cannot, after having decided that certain evidence is inadmissible, instruct the jury that the party offering it should have the benefit of a presumption that it was favorable, and that the other party, because he made a legal and proper objection, should thereby lay his case under the suspicion that he had been guilty of suppressing testimony.¹³ If the contents of the instrument destroyed or withheld are fully and satisfactorily proved by other evidence produced by the same party, the grounds for the presumption do not exist.¹⁴ And the rule is not applicable to such documents as a party has no right to give in evidence without the consent of the adverse party; the only effect of the refusal in such case being to authorize the adverse party to give secondary evidence of the contents of the documents withheld. Whatever inferences may be drawn against the party by reason of his failure to produce evidence in his possession or under his control are allowed on the theory that he willfully withholds such evidence.¹⁵ While there undoubtedly are cases where the failure of a party to give his evidence would raise a presumption against him, it could not be held to arise where a person brought an action for an injury which had impaired his mind and he was not called as a witness.¹⁶ Nor is there a "spoliation of evidence," within the range

¹² *Wentworth v. Lloyd*, 10 H. L. Cas. 589, 11 Eng. Reprint, 1154; *Lauer v. Banning*, 152 Iowa, 99, 131 N. W. 783. On the refusal or failure to waive privileged communication as raising presumption against party, see note to *Pennsylvania R. Co. v. Durkee*, 8 Ann. Cas. 792.

¹³ *Estate of Carpenter*, 94 Cal. 406, 119, 29 Pac. 1101.

¹⁴ *Miltenberger v. Croyle*, 27 Pa. 170.

¹⁵ *Merwin v. Ward*, 15 Conn. 377; *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470.

¹⁶ *Cramer v. Burlington*, 49 Iowa, 213.

of the presumption, where the destruction or mutilation of a document has been the result of mere inadvertence or mistake. Cases of voluntary destruction of papers, arising from mistake as well as from accident, might be illustrated *ad infinitum*. Such are where the party tore up a contract under the belief that the statements upon which it was founded were correct, and that he would have no further use for the contract itself;¹⁷ where the destruction was voluntary but without fraudulent intent;¹⁸ where an unrecorded deed was canceled with the intention of revesting title;¹⁹ where a will was destroyed under the mistaken belief that it was inoperative.²⁰ In an old but authoritative English case the rule is thus well stated: "If an original deed is lost, the counterpart may be read, and if there is no counterpart forthcoming, then a copy may be admitted, and even if there should be no copy, there may be parol evidence of the deed, and the manner of its being lost, unless it happens to be destroyed by fire, or lost by robbery, or any unforeseen or unavoidable accident, which are sufficient excuses of themselves."²¹ No prejudicial presumption arises where the loss or destruction of the documents is not attributable to the party in possession of them. A party will not be presumed, in the absence of evidence of the fact, voluntarily to have destroyed an instrument which he was interested in preserving.²² It is for the jury

¹⁷ *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483, 6 L. Ed. 140.

¹⁸ *Rudolph v. Lane*, 57 Ind. 118; *Old National Bank v. Findley*, 131 Ind. 230, 31 N. E. 64; *Rowley v. Ball*, 3 Cow. (N. Y.) 303; *Livingston v. Rogers*, 2 Johns. Cas. (N. Y.) 488; *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126.

¹⁹ *Bank v. Eastman*, 14 N. H. 438.

²⁰ *Wyckoff v. Wyckoff*, 16 N. J. Eq. 403.

²¹ *Villiers v. Villiers*, 2 Atk. 71, 26 Eng. Reprint, 444, reviewed at length in *Livington v. Rogers*, *supra*, and a note thereto says that the principle therein has been so generally affirmed that it is unnecessary to cite authorities

in confirmation. The English authorities will be found in 1 Phillipps' Evidence, Cowen & Hill's ed., 452 et seq.; Starkie's Ev., ed. 1842, p. 391; Gresley's Eq. Ev. 268. The American cases are collected with vast labor in 2 Cowen & Hill's Notes, pp. 1214-1233, and Greenleaf's work on Evidence, ed. 1842, vol. 1, pp. 593, 594. To the same effect are the Canadian cases: *St. Louis v. The Queen*, 25 S. C. R. 649; *Hazel v. Dyas*, 2 R. & C. 36.

²² *Foster v. Mackay*, 7 Met. (Mass.) 537; *Clark v. Hornbeck*, 17 N. J. Eq. 430; *Lee v. Lee*, 9 Pa. 169; *St. Louis v. Reg.*, 25 Can. Sup. Ct. 649.

to determine, under proper instructions from the court, what inferences are to be drawn from the failure of a party to produce evidence which is accessible to him or under his control.²³

§ 22 (19). Same—Effect of the presumption on the burden and degree of proof.—The strong expressions in opinions founded on the doctrine of *omnia praesumuntur contra spoliatores* often give rise to the impression that the existence and establishment of the presumption is conclusive proof against the party whose conduct has been the cause of it, and that there then exists no necessity for proof *aliunde*. It must not, however, be inferred that the presumption arising from the withholding or suppression of evidence by a party will wholly relieve the adverse party from the burden of proving his case. Like all other presumptions of the kind, for we are not dealing with conclusive presumptions of law, it is rebuttable and therefore not conclusive.²⁴ In an action for fraud upon the revenue a federal judge instructed the jury, in substance, that since the defendants had failed to produce proof in their possession, the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not, they were guilty. It was held on appeal that the instruction was error; that it set at naught established principles, since it substantially withdrew from the defendants their constitutional right of trial by jury and converted what at law was intended for their protection, the right to refuse to testify, into the machinery for their destruction.²⁵ Although, as has been seen from the cases

²³ Eldridge v. Hawley, 115 Mass. 410; Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176. As to the rebuttal of such presumptions see the late cases: Fleishman v. Polar Wave etc. Co., 163 Mo. App. 416, 143 S. W. 881; In re Lucke's Estate (Or.), 123 Pac. 46; North v. Jones (Ind. App.), 100 N. E. 84.

²⁴ Blumenthal v. Atkinson, 93 Ark. 252, 124 S. W. 510; Sloan v. Grollman, 113 Md. 192, 77 Atl. 577; Hurley v. Olcott, 198 N. Y. 132, 91 N. E. 270.

²⁵ Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908; State v. Wingo, 66 Mo. 186, 27 Am. Rep. 332, 336; State v. Hickam, 95

already cited, the courts have uniformly enforced the rule that every reasonable intendment is to be made against spoliation, and have sometimes used strong language in the statement of the rule, the presumption is clearly not conclusive, nor does it so far take the place of other proof but that some other evidence than the mere fact of suppression or spoliation is necessary to sustain a claim against the wrongdoer. In such cases at least a *prima facie* case must be established.²⁶ A presumption, it must be remembered, is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. It serves only till *prima facie* evidence has been adduced against it. That being adduced, the presumption has spent its force and served its purpose, and the *prima facie* case must be met by evidence and not presumptions.²⁷ The principle of the maxim, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance, and, therefore, slight evidence of the contents of the instrument will usually, in such a case, be sufficient. "There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence, and should be regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute."²⁸ The doctrine is, that unfavorable presumption and intendment shall be against the party who has destroyed an instrument which is the subject of inquiry, in order that he may not gain by his wrong.²⁹ But where there is express and positive evidence, there is no place for presumption or inference. As a rule, it is in

Mo. 329, 6 Am. St. Rep. 58, 8 S. W. 256; Gage v. Parmelee, 87 Ill. 343; Territory v. Lucero, 8 N. M. 557, 46 Pac. 22.

²⁶ Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908.

²⁷ Peters v. Lohr, 24 S. D. 605, 124 N. W. 853.

²⁸ 2 Best on Ev., § 412 et seq.

²⁹ Hunter v. Lauder, 8 C. L. J. (Can.) 17.

reference to the contents of a paper destroyed or withheld that the maxim can have application; and where the contents are proved, there is no occasion for resort to the maxim. If the evidence tendered is sufficient to satisfy the jury as to the terms of the document in dispute, calling in the assistance of the maxim is idle and unnecessary; if the evidence is not sufficient, *the principle of the maxim alone* is not sufficient to uphold a verdict.³⁰ The burden of proof lies upon the plaintiff to establish his cause of action, and there are no circumstances which excuse him from this obligation and impose the duty upon a defendant of proving that the alleged cause of action did not exist. The plaintiff may, as we have said, rest upon a *prima facie* case; but this requires the proof at least of some circumstances from which the existence of the actionable facts may be legitimately inferred.³¹ Summing up the various methods of rendering the application of the maxim, it may be put that to permit one party to overcome another by a presumption alone created by the conduct of such other would be a substitution of conjecture for proof. Wharton puts it that the presumption cannot be used to relieve the opposing party from the *onus* of proving his case; but that once a *prima facie* case is proved, sufficient of itself to sustain a judgment, then a party refusing to exhibit books that would, if produced, settle the matter one way or the other, or to give other explanations, not only prejudices his case, but precludes himself from subsequently objecting that the case of the opposing party, though sufficient for judgment, did not introduce all the facts.³²

§ 22a (19). Same — Effect of the fabrication of evidence.—Immediately akin to the withholding of evidence, and, indeed, producing much the same effect in the presumption raised, the fabrication of evidence is a fact to be

³⁰ Bott v. Wood, 56 Miss. 136, 141;
Cowper v. Cowper, 2 Will. (P.) 748.

³¹ Meagley v. Hoyt, 125 N. Y. 771,
773, 26 N. E. 719; Peters v. Lohr, 24
S. D. 605, 124 N. W. 853.

³² 2 Whart. Ev., § 1268. See, also,
note to Armory v. Delmirie, 1 Smith
Lead. Cas. 374; Life & Fire Ins. Co.,
7 Wend. (N. Y.) 31; Scovill v. Bald-
win, 27 Conn. 318; Peters v. Lohr, 24
S. D. 605, 124 N. W. 853.

considered in view of all the circumstances of the case in which it arose. In the same manner, too, it may either become unimportant by reason of other and perfectly satisfactory evidence of the fact or document created or suppressed, or of the highest import against the wrongdoer. On the other hand, one who is innocent of the charge made against him may, in excitement or fear, yield to the temptation of suppressing or manufacturing evidence.³³ In a case cited by Sir Edward Coke, an uncle was charged with the murder of his niece. The motive assigned for the murder was that on the death of the niece the accused would inherit her property. Being unable to find the child, the defendant dressed up another child to represent her. On the discovery of the fraud the accused was found guilty and executed; but some years afterward it was found that the girl supposed to have been murdered was still living and had run away.³⁴ Another instance is related by Jeremy Bentham, where it was proposed that all the persons present at a company should be searched to see if a valuable trinket which had been missed could be found. All submitted but one, who excited suspicion by his refusal. But when he consented to be privately searched it was found that he had not taken the trinket but had concealed some articles of food for the purpose of carrying them to his wife, who had no means of obtaining food.³⁵ The fabrication of documentary evidence raises an adverse inference probative in proportion to the effort made and risk incurred in manufacturing the false testimony, and this applies as well to oral as to written evidence.³⁶ It is laid down as a well-settled rule that all efforts by either party to a suit, directly or indirectly, to destroy, fabricate or suppress evidence may be shown, not as part of the *res gestae*, but in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence,

³³ Best, Ev., 10th ed., § 415.

³⁴ 3 Inst., c. 104, p. 232.

³⁵ 3 Benth. Jud. Ev., pp. 88, 89.

³⁶ 16 Cyc. 1061; United States v. Randall, 27 Fed. Cas. No. 16,118, D. C. N. D. Cal. 1880, 12 D. C. 1061; Lyons v. Lawrence, 12

Ill. App. 531; Brown v. Byam, 65 Iowa, 374, 21 N. W. 684; Fulkerson v. Murdock, 53 Mo. App. 151; McHugh v. McHugh, 186 Pa. 197, 65 Am. St. Rep. 849, 40 Atl. 410, 41 L. R. A. 805.

or by the fabrication of more evidence.³⁷ Evidence of the fact of an attempted subornation is admissible as an admission by conduct that the party's cause is an unrighteous one.³⁸ Generally, it may be taken that improper interference with the lawful course of an action by any tampering with testimony by fabrication, nonproduction, suppression, spoliation or destruction, gives rise to the presumption, because the conduct of the offender may properly be attributed to his suspicion that the truth would operate against him. The principle has been applied in a very large number of cases, and has been carried to the length that the failure of a party to an action to appear at the trial, when he had a strong motive to appear, was said to be evidence against him.³⁹ Just as cross-examination has been defined as "the art of knowing what not to ask," so the strength of a case often consists in what is not proved as well as in what is proved.⁴⁰ Proof of the forgery of false testimony is admissible against the party by whom the fabrication is made. The same presumption is drawn against all forms of attempted suppression of or tampering with evidence.⁴¹

§ 23 (20). Presumptions as to knowledge of the law.—The rules for the control of society would have been incomplete if it lay in the power of any malefactor to justify his wrongdoing by pleading ignorance, either that his act was inherently wrong or was prohibited by law. Hence at a very early stage we find the maxim, *Ignorantia juris (quod*

³⁷ *Chicago City Ry. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29.

³⁸ *Moriarty v. Railroad Co.*, L. R. 5 Q. B. 314; *Commonwealth v. Min Sing*, 202 Mass. 121, 88 N. E. 918; *Christy v. American Temperance Life Ins. Assn.*, 68 Misc. 178, 123 N. Y. Supp. 740.

³⁹ *Brown v. Shock*, 77 Pa. 471.

⁴⁰ *Frick v. Barbour*, 64 Pa. 120.

⁴¹ 2 Whart. Ev., 3d ed., § 1265. See, also, 1 Taylor Ev., § 115; 1 Greenl. Ev., 15th ed., §§ 37, 196; and Best, Ev., § 411. See, also, *Moriarty*

v. London Ry. Co., L. R. 5 Q. 314; *Egan v. Bowker*, 5 Allen (Mass.), 449; *Winchell v. Edwards*, 57 Ill. 41; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14; *Heslop v. Heslop*, 82 Pa. 537; *McHugh v. McHugh*, 186 Pa. 197, 65 Am. St. Rep. 849, 40 Atl. 410, 41 L. R. A. 805; *Attorney General v. Haliday*, 26 U. C. R. 397; *Ockley v. Masson*, 6 A. R. 108; *Lowell v. Todd*, 15 C. P. (Ont.) 306.

quisque tenetur scire) *neminem excusat*, since colloquially shortened by the omission of the words in parentheses, adapted from the Roman into the English law and inflexibly applied in criminal cases.⁴² "Everyone is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is."⁴³ It must be readily acknowledged that without such a presumption, no rights of life or property could be safeguarded, and the rule stands based on its necessity just as much as on the expediency or policy of its existence. Its extension to civil proceedings was almost contemporaneous with its introduction, and our whole system of that branch of jurisprudence dealing with the responsibility of the doer of an act for its consequences is built upon the foundation that irrespective of his knowledge of the impropriety of his act, the fact that it was contrary to law raised the presumption that he knew the law when the act was done. We do not deal here with intent where such intent forms the gravamen of the offense; we confine the proposition to the limit above assigned to it, in order that the importance of its bearing may not be lost. If the person accused of an offense were permitted to avail himself of the defense that he did not know his act was contrary to law, the courts would be confronted with the almost impossible task of proving the denial of his negative assertion; and, except in rare cases, no conviction could be obtained. Therefore, and while an offender may claim the benefit of the presumption of innocence until his fault is established, the state may place upon him the obligation of the presumption of his knowledge of the law, whether he be innocent or guilty. The judge-made law which practically controls the status of presumptions reads uniformly in civil and criminal cases; the limitations to which we shall presently refer serving only to illustrate and emphasize the necessity for that inflexibility of the rule which good order demands. "If ignorance of law

⁴² Cooley's Blackstone, 1233; Criminal Code of Canada, § 22; 55 & 56 Vict., c. 29, § 14.

⁴³ Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

could be admitted in judicial proceedings, as a ground of complaint, or of defense, courts would be involved and perplexed with questions incapable of any just solution, and embarrassed by inquiries almost interminable until the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground of exemption; and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judgments would be founded. The fact itself is incapable of proof by evidence of the character demanded in courts of justice. It is really insoluble, for it is in its very nature rather matter of conjecture, or mere inference than of fact.”⁴⁴ It may be taken, then, that the rule applies equally to the civil law in both branches as to the criminal, and to actions that lie in contract as to those that sound in tort. In criminal cases the maxim is most often applied in its original form, and this arises from the fact that in such cases it is the defendant who invariably seeks the protection of his alleged ignorance. In civil cases, however, the maxim is, as a rule, “everyone is supposed to know the law.” While it would be inconvenient to cite all the instances of its application, it is to be noted that in a vast number of cases the rule has been applied in the face of learned pleading for its special suspension. The same consideration which forbids a party to urge his ignorance of the law as a defense to a criminal charge also forbids that he should plead his ignorance of the law as an excuse for the failure to comply with contractual obligations. One claiming or defending under a contract is presumed to know the law from which is derived the vitality of the contract.⁴⁵ Litigants cannot claim ignorance of law as to pre-

⁴⁴ *Hardigree v. Mitchum*, 51 Ala. 151, 153, cited in *Upton v. Tribilcock*, 91 U. S. 51, 23 L. Ed. 206.

⁴⁵ *Long v. Newman*, 10 Cal. App. 430, 102 Pac. 534; *Day v. Snider Brokerage & Storage Co.* (Tex. Civ. App.), 130 S. W. 718; *Loud v. Collins*, 12 Cal. App. 786, 108 Pac. 880; *New Haven Trust Co. v. Camp*

(Conn.), 76 Atl. 1100; *Lockwood v. Title Ins. Co.*, 73 Misc. Rep. 296, 130 N. Y. Supp. 824; *United States v. McPhee*, 51 Colo. 425, 118 Pac. 996. See the late cases: *Newman v. Fidelity Savings etc. Assn.* (Ariz.), 128 Pac. 53; *Briggs v. People*, 21 Colo. App. 85, 121 Pac. 127; *Murray v. Gault* (Ind. App.), 98 N. E. 878; *Rossiter v. Peter*

sumption of payment from lapse of time;⁴⁶ nor as to their liability to pay according to the terms of a contract;⁴⁷ nor as to the priority of judgments.⁴⁸ Holders of government bonds are presumed to have knowledge of the laws by which such bonds were created and issued.⁴⁹ Every man is presumed to know the law, and if he makes a contract with a public officer in contempt of the requirements of the statute, he becomes knowingly an accessory to its violation.⁵⁰ Those dealing with officers of municipal corporations cannot plead want of knowledge of the scope of their powers. No principle relating to municipal corporations is more firmly established than that those who deal with their agents or officers must, at their peril, take notice of the limits of the powers both of the municipality and of those who assume to act as its agents and officers.⁵¹ Members and officers of municipal corporations, and citizens therein having dealings with the corporation, cannot plead ignorance of the ordinances or by-laws of such corporations.⁵² A postoffice employee is presumed to know the general postal regulations.⁵³ It has been held that it is both reasonable and proper that those who travel in private vehicles should inform themselves of those common and reasonable regulations adopted by the carriers duly

Cooper's Glue Factory, 149 App. Div. 752, 134 N. Y. Supp. 162; Hebron v. City of New York, 138 N. Y. Supp. 1010; Mackmull v. Brandlein, 137 N. Y. Supp. 607; Cartwright v. La Brie (Tex. Civ. App.), 144 S. W. 725; Foard County v. Sandifer (Tex.), 151 S. W. 523; Ft. Worth etc. R. Co. v. Southern Kansas R. Co. (Tex. Civ. App.), 151 S. W. 850; State v. Palacios (Tex. Civ. App.), 150 S. W. 229.
⁴⁶ Goodwyn v. Baldwin, 59 Ala. 127.

⁴⁷ Mears v. Graham, 8 Blackf. (Ind.), 144; Gist v. Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426; Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62; Upton v. Tribilcock, 91 U. S. 51, 23 L. Ed. 206.

⁴⁸ Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512.

⁴⁹ City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293; United States v. Manhattan Sav. Inst., 113 U. S. 476, 28 L. Ed. 1044, 5 Sup. Ct. Rep. 588.

⁵⁰ Clark v. United States, 95 U. S. 539, 24 L. Ed. 518; Strong v. District of Columbia, 1 Mackey (D. C.), 265.

⁵¹ State v. Kirkley, 29 Md. 110; Wadsworth v. Board of Supervisors of Livingston County, 115 N. Y. Supp. 8.

⁵² Hope v. City of Alton, 214 Ill. 102, 73 N. E. 406; Holtsclaw v. State (Ind. App.), 92 N. E. 121; Inhabitants of Palmyra v. Morton, 25 Mo. 593; Galbreath v. City of Meberly, 80 Mo. 484.

⁵³ East Tennessee V. & G. R. Co. v. White, 83 Tenn. 340.

published for their safety. There is nothing harsh or unreasonable in requiring that those who travel in the cars and vehicles of public carriers should acquaint themselves with those rules adopted by the carriers for the better service of the public and insuring the safety of the passengers.⁵⁴ The same rule of presumption applies to persons dealing with corporations. They must take notice of whatever is contained in the law of their organization, and they must be presumed to be informed as to the restrictions or conditions annexed to the grant of power by the law by which the corporation is authorized to act.⁵⁵ In the case of a savings bank prohibited by statute from borrowing money, the loan to it from another savings bank could not be recovered on the ground that the lender was conclusively presumed to have knowledge of such statute.⁵⁶ A church corporation has been held to have known the state of the law whereby a town council might prohibit and regulate burials, and to have purchased their lands with such knowledge.⁵⁷ Where the owner of cattle, seized by an officer of the humane society, caused such officer to be arrested therefor, knowing him to be such officer, it was presumed that the owner knew the law relating to such seizures and that the action of the officer was justified.⁵⁸ And the presumption is stronger, if possible, in cases of officers of the law. A sheriff cannot excuse himself on the ground of ignorance for presenting an account to the county, the payment of which the law did not authorize.⁵⁹ Nor can the official sureties of a public administrator and guardian be excused from the knowledge of the statutes under which their principal is appointed.⁶⁰ Mr. Justice

⁵⁴ *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192.

⁵⁵ *Silliman v. Fredericksburg O. & C. Co.*, 27 Grant, 119; *Pearce v. Madison & Ind. R. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Zabriskie v. Cleveland R. R. Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488.

⁵⁶ *State v. Corning State Savings Bank*, 136 Iowa, 79, 113 N. W. 500; *Pittsburgh, C. & St. L. R. Co. v. Keo-*

kuk & Hamilton Bridge Co., 131 U. S. 371, 33 L. Ed. 157, 9 Sup. Ct. Rep. 770.

⁵⁷ *Iuszkewicz v. Luther*, 30 R. I. 570, 76 Atl. 829.

⁵⁸ *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336.

⁵⁹ *Law v. Smith*, 34 Utah, 394, 98 Pac. 300.

⁶⁰ *Newman v. Flowers' Guardian*, 134 Ky. 537, 121 S. W. 652.

Bailey, in dealing with certain alleged equitable rights which had arisen in breach of a statute, puts it thus cogently:⁶¹ "There is no question of equity here. The question is whether the clear, unequivocal provisions of the statute are to be complied with. The defendants are to be presumed to know of the existence of the statute, and it is wholly through their failure to comply with its terms that they find themselves in their present plight." So a testator is presumed to have knowledge of the law relating to perpetuities, and that he could not prolong the time for the vesting of his estate or within which it might be accumulated beyond a certain period. He is "subject to the universal presumption of knowledge of the law."⁶² When admissions are made as to the title to property by the party in possession, the presumption arises that such admissions were made with knowledge of the law bearing upon them.⁶³ The law of descent is presumed to be known by every person.⁶⁴ There is no necessity to bring a statute under the notice of the court, as both the court and the parties are presumed to have cognizance of it,⁶⁵ except when by the terms of a statute it is made necessary to plead it specially, as in the case of statutes of limitation. A similar rule obtains in defenses in actions of tort. It is no defense in actions for false imprisonment that the officer supposed void writs to be valid;⁶⁶ and in actions for malicious prosecution the court will instruct the jury on the subject of probable cause that parties are presumed to know the law.⁶⁷ A defendant who had assumed the responsibility of making an unqualified charge that the plaintiff was a thief and had stolen his corn, and had then sought to be relieved from a portion of the consequences of his temerity, was not permitted to allege his ignorance of the law in relation to the constituents of the crime of larceny.⁶⁸

⁶¹ *Saxton v. Perry*, 47 Colo. 263, 107 Pac. 281, 284.

⁶² *Van Riper v. Hilton* (N. J. Ch.), 78 Atl. 1055.

⁶³ *Butler v. Livingston*, 15 Ga. 565.

⁶⁴ *Hallett v. Alexander* (Colo.), 114 Pac. 490.

⁶⁵ *Cunningham v. Cunningham*, 72 Conn. 157, 44 Atl. 41.

⁶⁶ *Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367.

⁶⁷ *Wills v. Noyes*, 12 Pick. 324.

⁶⁸ *Bisbey v. Shaw*, 15 Barb. 578.

§ 23a (20). **Same—Limitations of the rule.**—As appears above, the rule is to all intents and purposes inflexible, and to apply it literally to all situations would take from it “all its virtue, and make it odious to all right and just thinking men.”⁶⁹ There do exist cases, and they appear to us sound law, in which the courts have refrained from applying it in all its rigid severity. While we cannot go the length of Marshall, J.,⁷⁰ who says: “While it is often said that the presumption is that everyone knows the law, that is, in some respects, a legal relic. It is, in its broad sense, obsolete. It is so said, in effect, in all modern text-books, based on judicial authority,” we are perforce compelled to agree with him that, in its strict letter, to impute such knowledge to laymen would be to make a maxim *ad absurdum*. Indeed, this view has already been entertained, for one writer⁷¹ quotes the language of an eminent judge that: “There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so. . . . If everybody knew the law, there would be no need of courts of appeal, whose existence show that judges may be ignorant of law.” Mr. Justice Marshall is right, however, when he says that the legal presumption does exist, and is applicable wherever necessary to the due administration of justice, and that the maxim is a rule of necessity and limited in its scope by the reason of it; the reason being that otherwise mere ignorance in fact of the law would furnish immunity from punishment for violation of the criminal code and from liability for actual loss for violations of personal and property rights. Where a statute provided a certain marriage fee and penalized any person willfully and corruptly demanding a greater fee than that nominated, the fact that a justice of the peace demanded and received a greater fee for performing the ceremony at a distance from his office and furnishing a certificate not ordinarily required was not alone sufficient to sustain a conviction on the pre-

⁶⁹ Brent v. State, 43 Ala. 297.

⁷¹ Lawson on Presumptive Evi-

⁷⁰ Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554.

dence, 5.

sumption of his knowledge of the law.⁷² While the decision arrived at was, in our opinion, right, one of the reasons assigned seems to have been misconceived. The opinion⁷³ says: "There was no evidence of the defendant's knowledge of the statutory provision for compensation, and, upon the question whether one acts corruptly, there is not a conclusive presumption that one knows the law." To us it seems that the legal reason should have been that the defendant was presumed to know the law, and, knowing it, interpreted it that his act was not corrupt, and the issue should have been as to the intent rather than to the knowledge, which was less material, and the excuse that "it is at least conceivable that there are many justices of the peace in the commonwealth who are ignorant of this subject" (the legal fee) seems really beside the question. The conclusion of the opinion referred to correctly puts it that whether the defendant was acting willfully and corruptly or innocently and fairly was a question of fact for the judge who tried the case without a jury. Nor does the maxim apply to a matter of law arising out of the doubtful construction of a grant.⁷⁴ Another and equally important limitation of the rule turns upon the construction of the phrase "knowledge of the law." By "law" must be understood the public general law of the state, the common law as well as the statute law, exclusive of private statutes, except where the person has done acts or entered into contracts specially with regard thereto, or can be charged with knowledge. So no presumption arises as to knowledge of mere departmental acts of the government. A criminal information which simply alleged that accused did openly disobey a quarantine order of the county superintendent of health, prohibiting him from going upon the street, by so going upon the street, stated no cause of offense. Such an order is unlike a general law, knowledge

⁷² *Vogel v. Brown*, 201 Mass. 261, 87 N. E. 686.

⁷³ 201 Mass. 262, 87 N. E. 687.

⁷⁴ *New York & Cleveland Gas Coal Co. v. Graham*, 226 Pa. 348, 75 Atl. 657. The law does presume for some

purposes that all persons know the law; but not for the purpose of supplying evidence of a fact material to the controversy: *Coffey v. Tindall*, 99 Miss. 851, 56 South. 177.

of which is imputed to everyone.⁷⁵ As to proclamations by the executive government, there seem to be no express decisions, but in so far as the very object of a proclamation is to make known the law rather than to make or unmake that law,⁷⁶ in the writer's opinion, knowledge of their contents would be properly presumed in all cases in citizens of the state in which such proclamation was made.

§ 23b (20). Same—Knowledge of law of other states or countries.—Ordinarily, the residents of one state are not presumed to know the laws of another state.⁷⁷ There are, however, cases in which the knowledge of extraterritorial laws is presumed, but they are limited in their application to where one has dealings or business transactions in such state or foreign country. Inasmuch as a foreigner trading in or to this country is bound to take notice of our laws, and a contract made by him in violation of them cannot be enforced, and a nonresident is presumed to know the law of the place where he makes a contract,⁷⁸ though a mistake as to foreign law is sometimes treated as a mistake of fact,⁷⁹ so every man is presumed to know the laws of the country in which he dwells or in which, if residing abroad, he transacts business.⁸⁰ A mortgagee of property in a state other than that wherein he resides, having knowledge of facts concerning such property, is presumed to know the laws relating thereto.⁸¹ Where a corporation is organized in one state to do business in another, knowledge of the laws of that other state is presumed. "Contracting with reference to the laws of that state, they must be presumed to know the provisions of its laws."⁸²

⁷⁵ *State v. Butts*, 3 S. D. 577, 19 L. R. A. 725, 54 N. W. 603.

⁷⁶ *Chavasse, Ex parte, Grazebrook*, in re, 4 De Gex, J. & S. 655, 34 L. J. Bk. 17, 11 Jur., N. S., 406; 12 L. T. 249; 13 W. R. 627, 46 Eng. Reprint, 1072.

⁷⁷ *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094; *Haven v. Foster*, 26 Mass. 112, 19 Am. Dec. 353; *Finch v. Mansfield*, 97 Mass. 89.

⁷⁸ *Tyson v. Passmore*, 2 Pa. 122, 44 Am. Dec. 181.

⁷⁹ *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *King v. Doolittle*, 1 Head (Tenn.), 77; *Craigellachie Co. v. Bigelow*, 37 Nova Scotia Rep. 482.

⁸⁰ *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

⁸¹ *Knower v. Haine*, 81 Fed. 513, 24 Blatchf. 488.

⁸² *Huthsing v. Bosquet*, 17 Fed. 54, 3 McCrary, 569; *Pinney v. Nelson*,

§ 23c (20). **Same — Knowledge that law may be changed.**—According to a comparatively recent decision,⁸³ not only is the subject presumed to know the sovereign laws, but also that such laws may be changed “*et nos mutamur in illis*.” While the court must construe a will under the law in force when a testator dies, it was held in the case referred to that the testator was bound to know when he executed his will that the laws regulating its construction and affecting property might be changed before his death. In England, a defendant was convicted of malicious shooting upon the high seas, upon an indictment laid under a special statute passed only a few weeks before the offense was committed, and of which statute no notice could have reached the place where the shooting occurred. The conviction was upheld, but the judge subsequently recommended a pardon.⁸⁴

§ 24 (21). **Effect of mistake as to matters of law.**—Mistake in law belongs to the domain of the equity jurist rather than that of the commentator on the law of evidence; but it reluctantly presents itself when the subject of presumptions has to be considered. In its consideration, insistent care must be observed to keep distinct the mistake of fact, which, not being germane to this treatise, is dismissed with the broad general assertion that ignorance of fact is a constant ground for relief in all our courts. The instant, however, the emergency arises that a party, knowing the facts, has either misapprehended his legal rights or has acted in unconscious disregard of “some general rules of the municipal law applicable to all persons, which regulate human conduct, determine rights of property, of contract, and the like, such as the rules making certain acts criminal, and those controlling devolution, acquisition, and transfer of estates, and those prescribing

183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52; *Keystone Diller Co. v. Superior Court of City & County of San Francisco*, 138 Cal. 733, 72 Pac.

398; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 61.

⁸³ *Hayes v. Martz*, 173 Ind. 279, 89 N. E. 303, 90 N. E. 309.

⁸⁴ *R. v. Bailey*, R. & R. 1.

the modes of entering into agreements,"⁸⁵ he is confronted in any effort for relief from the consequences of his act by the presumption of *ignorantia juris neminem excusat*. Pomeroy, in his great work on Equity Jurisprudence, may be confidently referred to as an unfailing source of knowledge on this subject, and while there are authorities, and respectable authorities, opposed, it may be taken as the general rule that there is no relief against mistakes of law.⁸⁶ True, there are some exceptions with which we shall deal, but there seems to be no trend in the direction of any relaxation of the stringency of the original presumption. Such recent cases as have been the product of the courts of the last few years uphold it unswervingly. Even where counsel had advised a particular course of action, which was adopted by his client, the court held that "the advice, if given, was an erroneous view as to the law, and is not a sufficient ground for relief."⁸⁷ Where both parties to a conveyance were ignorant of the law, but had full knowledge of the facts, the mistake itself was no ground for equitable relief where there were no special circumstances or facts in the case that would aid the purchasers' ignorance or mistake of the law in moving a chancellor to grant the relief prayed for.⁸⁸ Indeed, we are not stating the proposition too largely when we say that in no case is ignorance or mistake of law with a full knowledge of the facts, *per se*, a ground for equitable relief.⁸⁹ The authorities are agreed that where the transaction is untainted with fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or other inequitable

⁸⁵ Pomeroy, Eq. Jur., 3d ed., § 841.

⁸⁶ *Houston v. Northern Pac. R. Co.*, 109 Minn. 273, 123 N. W. 922; *Millard v. Delaware L. & W. R. Co.*, 224 Pa. 448, 73 Atl. 904; *Keazar v. Colebrook Nat. Bank*, 75 N. H. 278, 73 Atl. 170; *Texas & N. O. R. Co. v. Sabine Tram Co.* (Tex. Civ. App.), 121 S. W. 256; *Territory v. Newhall*, 15 N. M. 141, 103 Pac. 982; *Wheaton Building & Lumber Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Irvin v. Johnson* (Tex. Civ. App.), 120 S. W. 1085.

⁸⁷ *Weed v. Weed*, 94 N. Y. 243; *Jacobs v. Morange*, 47 N. Y. 57; *Treadwell v. Clark*, 124 App. Div. 260, 108 N. Y. Supp. 733.

⁸⁸ *In re Mulholland's Estate*, 224 Pa. 536, 132 Am. St. Rep. 791, 73 Atl. 932, 934.

⁸⁹ *Norris v. Crowe*, 206 Pa. 438, 98 Am. St. Rep. 783, 55 Atl. 1125; *Appeal of Pennsylvania Stave Co.*, 225 Pa. 178, 133 Am. St. Rep. 875, 73 Atl. 1107, 1109.

conduct, the party who knew, or had the opportunity to know, the contents of an instrument, cannot defeat its performance or obtain its cancellation because he mistook the legal meaning and effect of the whole or any of its provisions.⁹⁰ An excellent illustration of this occurred in Illinois, where an intending purchaser of the second story of a house was advised that a ninety-nine years' lease was the proper legal instrument to be used. The character of the instrument was discussed by the parties to it, and while it was the intention of everyone concerned that the fee simple title to the second story of the building was to be conveyed, and it was their belief that this was done by the instrument executed, all the parties agreed to the form of the instrument as drawn. Subsequently the lessee called upon the lessor to maintain the leased property; the lessor refused, and ultimately sought the reformation of the instrument. The opinion of Cooke, J., says: "The parties cannot be said to have been mutually mistaken as to any question of fact. They each understood fully what language was to be contained in the instrument. It is true the legal effect of that language is different from what they understood it to be or from what they intended. This cannot be said, in any sense, to be a mistake of fact. It was a mistake of law as to the legal effect of the language used and adopted by the parties, and is not such a mistake as equity will relieve against."⁹¹ Where the lessor of a coal mine, duly assessed, paid the taxes, believing that he was legally liable, his mistake was one of law, and he could not recover from the lessee the amount so paid.⁹²

§ 24a (21). Same—Exceptions.—The designation of the rule as broad and general creates the well-founded supposi-

⁹⁰ Pomeroy, Eq. Jur., 3d ed., § 843; Gebb v. Rose, 40 Md. 387; Euler v. Schroeder, 112 Md. 155, 76 Atl. 164; McCord v. Bright, 44 Ind. App. 275, 87 N. E. 654; Grand Lodge I. O. O. F. v. Troutman, 80 Kan. 441, 103 Pac. 94; Condor v. Secrest, 149 N. C. 201, 62 S. E. 921; Champlin v. Laytin, 6 Paige, 189, 195.

⁹¹ Tilton v. Fairmont Lodge No. 590, A. F. & A. M., 149 Ill. App. 530, affirmed 244 Ill. 617, 91 N. E. 644.

⁹² Millard v. Delaware L. & W. R. Co., 224 Pa. 448, 73 Atl. 904. See, also, Stewart v. Ticonic Nat. Bank, 104 Me. 578, 72 Atl. 741; United States v. Mason, 33 App. D. C. 350.

tion that there are some admitted qualifications of it. While the courts almost uniformly maintain the purity of the presumption, and the doctrine has come to be regarded as well settled that, in general, a mistake of law, pure and simple, is not an adequate ground for relief, it has been held by judges of the highest ability that the general doctrine embodied in the maxim, *Ignorantia juris non excusat* is confined to mistakes of the general rules of law, and that it has no application to the mistakes of persons as to their own private legal rights and interests.⁹³ Under peculiar circumstances, when two parties ignorant of a matter of law enter into a contract for a particular object, and the result according to law is different from what they mutually intended, courts of equity will interfere to prevent the enforcement of the contract and to relieve them from the unexpected consequences of it. Such action is deemed necessary to prevent one party taking an unconscientious and inequitable advantage of the other and to stop him from deriving a benefit from the contract which neither of them intended it should produce. The same desire to extend relief and to safeguard exceptional cases has been adopted in England. Where a man, being ignorant that certain property belonged to himself, and supposing that it belonged to another, agreed to take a lease of it from the supposed owner, and there was no fraud nor unfair conduct, and parties were equally aware of the facts, the house of lords set aside the agreement on account of mistake, a majority of the judges calling it a mistake of fact. The remarks of Lord Westbury call for permanent record: "In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said *ignorantia juris haud excusat*; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact. It may be

⁹³ *Burton v. Haden*, 108 Va. 51, 15 738, followed in *Waggoner v. Waggoner* (Va.), 68 S. E. 990.
L. R. A., N. S., 1038, 60 S. E. 736,

the result, also, of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake";⁹⁴ and the same learned judge said in another case:⁹⁵ "It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity (election)." Vice-Chancellor Wigram, after distinguishing cases of compromises where there are doubts as to the rights of the parties, says: "But if the parties are ignorant of facts on which their rights depend, or erroneously assume that they know those rights, and deal with their property accordingly, not upon the principle of compromising doubts, this court will relieve against such transactions."⁹⁶ Reference to English cases would be incomplete without the opinion of Lord Chelmsford, cited in a recent American case.⁹⁷ He said, "With regard to the objection that the mistake was one of law, and that the rule *ignorantia juris neminem excusat* applies, I would observe, upon the peculiarity of this case, that the ignorance imputed to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from ignorance of a well-known rule of law." He further observes in the same case⁹⁸ that "Although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grants would be construed." A similar case occurred in the United States, where one

⁹⁴ Cooper v. Phibbs, 2 L. R. Eng. 205; Bingham v. Bingham, 1 Ves. Sr. 126.
 & Ir. App. 149.

⁹⁵ Spread v. Morgan, 11 H. L. Cas. 588, 602.

⁹⁶ Reynell v. Sprye, 8 Hare, 222;
 Lansdowne v. Lansdowne, 2 Jac. & W.

205; Bingham v. Bingham, 1 Ves. Sr. 126.

⁹⁷ New York & Cleveland Gas Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657, 660.

⁹⁸ Beauchamp v. Winn, L. R. 6 H. L. 223.

party purchased from another property which already belonged to the purchaser. The striking feature of the case was that the vendor succeeded in selling to the purchaser land of which the purchaser was already the equitable owner and which he did not have to purchase, and as it did not appear that the purchaser voluntarily entered into the contract with full knowledge of all the material facts, he was not estopped from repudiating the contract and insisting on his rights.⁹⁹ A mistake as to the ownership of land is a mistake of fact, in regard to which equity will give relief, although the mistake arose from an erroneous view of the legal effect of a deed. Against such a mistake, equity will relieve.¹⁰⁰ The exceptions, however, in the language of Judge Story, are few, and generally stand upon some very urgent pressure of circumstances. If a man, through misapprehension or mistake of the law, parts with or gives up private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.¹ Where a widow who did not know she was the sole heir, on the advice of her counsel conveyed away the estate of her husband, reserving to herself a life interest only, under the belief that she could renounce her rights under her husband's will and thus secure for herself a greater part of the estate, she was held entitled to relief from the mistake.² Mr. Pomeroy ably sums up the exception when he says:³ "Equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." A mistake by a party as to his antecedent existing legal rights, as distinguished from a mistake as to the legal import of the act done, fur-

⁹⁹ *Houston v. Northern Pac. Ry.*
Co., 109 Minn. 273, 123 N. W. 922,
924.

¹⁰⁰ *Livingstone v. Murphy*, 187
Mass. 315, 105 Am. St. Rep. 400, 72
N. E. 1012.

¹ *Webb v. City Council of Alexandria*, 33 Gratt. 168.

² *Hoy v. Hoy*, 93 Miss. 732, 136
Am. St. Rep. 548, 17 Ann. Cas. 1137,
48 South. 903.

³ *Pomeroy, Eq. Jur.*, § 849.

nishes a ground for equitable relief from the consequences of the mistake, in cases where the mistake can be rectified without injury to the rights of others.⁴ This decision is supported by a number of well-considered authorities,⁵ all cited and discussed in another recent case.⁶ The circumstances must, nevertheless, be exceptional to warrant any interference with the presumption of knowledge of the law, on the main ground that few transactions would be safe, if they could be set aside merely because the parties to them misapprehended their legal rights.⁷ The conclusion the lawyer may safely draw is that, given the exceptional circumstances, a mistake in law will be rectified, without going the length of the *dictum*, that the rule as to ignorance of the law is subject to so many exceptions that it is quite as often inapplicable as applicable.⁸ Relying rather upon more modern *dicta*, such as that it is now well settled that a mistake as to law may, under certain circumstances, afford ground for equitable relief,⁹ and that the proposition that relief never can be given in respect to a mistake of law is inaccurate,¹⁰ it may be accepted that on a proper scrutiny of exceptional circumstances, so that the court may see in which direction the equity lies, relief commensurate with the claim will not be refused by the courts exercising at this date that particular jurisdiction.

§ 25 (22). Parties presumed to know the legal effect of their contracts.—It is a short step from the presumption of knowledge of the law to the knowledge of the legal effect of an instrument which a party has signed, and we have partially dealt with the subject in the preceding sec-

⁴ In re McFarlin (Orphans' Court of Delaware), 75 Atl. 281, 283.

⁵ Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52; Freichnecht v. Meyer, 39 N. J. Eq. 551; Lawrence County Bank v. Arndt, 69 Ark. 406, 65 S. W. 1052; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919; Hausbrandt v. Hofer, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494.

⁶ Reggio v. Warren (Mass.), 93 N. E. 805.

⁷ Errett v. Wheeler, 109 Minn. 157, 123 N. W. 414, 417.

⁸ Swedesboro Loan & Building Assn. v. Gans, 65 N. J. Eq. 132, 55 Atl. 82.

⁹ Williams v. Hamilton, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029.

¹⁰ Allcard v. Walker (1896), L. R. 2 Ch. 369, 381.

tion when considering the effect of the lease executed in lieu of a conveyance.¹¹ The presumption of such knowledge is now generally recognized.¹² A party being presumed to know the effect of what he has undertaken by his signature is, *a fortiori*, presumed to know the contents of an instrument signed by him or by his agent thereunto lawfully authorized, and has therefore no right to rely on the statements of the other party as to its legal effect.¹³ He is presumed to know the law from which is derived the vitality of the contract into which he enters, and presumably read, and became thoroughly familiar with, the full import and scope of the terms of said contract before making himself a party to it.¹⁴ It follows that he is presumed to know the contents of a document prepared by him or his agent.¹⁵ One applying for insurance, and entering into a contract with that view, must be presumed to know something, to be competent to contract, and therefore to understand the general nature and fundamental principles of the contract into which he enters, especially when these are expressed in unambiguous terms; and, unless some imposition or deception has been practiced to prevent it, and it is not shown that he is incapable of reading, he must be presumed to have read the paper he has signed.¹⁶ This is the usual presumption in reference to all instruments, but there is a conflict of authority as to the distinction to be made between persons who can write and those who cannot, or who make their signature by mark. In olden times when few could write, and instruments were executed by the party affixing his private seal, the law presumed, once the execution was proved, that the maker had taken the precaution to learn the contents before he executed it. He was not permitted to escape its binding effect by merely

¹¹ Tilton v. Fairmont Lodge No. 590, A. F. & A. M., 149 Ill. App. 530, affirmed, 244 Ill. 617, 91 N. E. 644.

¹² Mears v. Graham, 8 Blackf. (Ind.) 144; Kernochan v. Murray, 111 N. Y. 306, 7 Am. St. Rep. 744, 2 L. R. A. 183, 18 N. E. 868; Cau v. Texas & P. R. Co., 194 U. S. 427, 48 L. Ed. 1053, 24 Sup. Ct. Rep. 663.

¹³ Clem v. Railway Co., 9 Ind. 488, 68 Am. Dec. 653; Harris v. Story, 2 E. D. Smith (N. Y.), 363.

¹⁴ Long v. Newman, 10 Cal. App. 430, 102 Pac. 534.

¹⁵ Perrin v. United States Exp. Co., 74 N. J. L. 515, 74 Atl. 462.

¹⁶ Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

showing he did not know its contents, although he, no doubt, might, by showing that it was falsely read to him; and while in one case¹⁷ it was held that one signing by mark was presumed to know the contents of the instrument signed, in another¹⁸ it was decided that where an instrument had been executed by mark, the presumption would arise that the maker of the mark was illiterate and unable to read or write. This presumption would, of course, be rebuttable by evidence to the contrary. In the writer's opinion the latter view is the more correct, and this seems to have commended itself to the old-time lawyers who instituted the now well-known certificate that the instrument was read over and explained to the maker of the mark, and that he seemed perfectly to understand it and was illiterate and unable to write, and therefore made his mark. The object of stating in the certificate that the maker of the mark was illiterate was to explain away the contingency of his being unable to write from some physical cause. This presumption of knowledge of the contents is not conclusive, however, and may be overcome by proof of mistake of fact or of fraud.¹⁹

In the absence of evidence showing fraud or mistake, this presumption becomes so far conclusive that no evidence can be introduced to show an understanding different from that which the law would imply from the instrument itself, and the contract should be interpreted as the parties must be supposed to have understood its terms at the time.²⁰ One exception to this general rule is in the case of a will, in that the power to make wills, the manner of executing them, and their efficacy, depend upon certain special provisions of statute law. The question therefore properly arises whether the signature to a will is *per se* sufficient to establish a knowledge of its contents by the testator. These instruments are often prepared for persons in the last stages of existence to execute; and at a time

¹⁷ Doran v. Mullen, 78 Ill. 342.

¹⁸ Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593.

¹⁹ §§ 435, 437, *post*.

²⁰ Gist v. Drakely, 2 Gill (Md.), 330, 41 Am. Dec. 426; Clay v. Ballard, 9 Rob. (La.) 308, 41 Am. Dec. 328; Watson v. Van Sickle (Tex. Civ. App.), 114 S. W. 1160.

when both body and mind have become more or less enfeebled; and when great anxiety and depression have been superinduced; and even, sometimes, when there is but a glimmering of reason flickering in the socket. What can be more reasonable than that, in such case, there should be something more than a mere legal presumption, arising from the act of signing, that a testator knew the paper signed by him to be his last will?²¹

§ 25a (22). **Parties presumed to know the records in their own legal proceedings.**—Parallel with the knowledge of the contents of documents is the knowledge of the records of legal proceedings in which one is engaged, and the rule of law is that every man knows the records of the proceedings of our courts after he has been brought into court, either by himself or his counsel;²² and his knowledge also of the times appointed for the terms of court fixed by law is presumed, and he, as well as the court, is bound to know and observe them.²³

§ 26 (22). **Same — Misrepresentations as to law.**—The importance of preserving as inviolate as possible the guiding maxims of the law and treating the various exceptions as growths testifying the strength of the parent plant is never better exemplified than in the great rule of *ignorantia juris neminem excusat* just dealt with. While exceptions to it have been fully and fairly recognized, commentators are perforce compelled to notice the satellite rules which have sprung into existence, and which, while maintaining all the attributes of an ancillary life, have a strength and virility all their own. Founded on the original rule that everyone is supposed to know the law, it must logically follow that misrepresentations respecting it afford ground neither for action nor defense. Since the parties are supposed to know the law, they cannot claim to have been deceived by a misrepresentation of it. The principle of relief

²¹ *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Swett v. Boardman*, 1 Mass. 258, 2 Am. Dec. 16; and see § 189, *post*.

²² *Watrous v. Rodgers*, 16 Tex. 410.

²³ *Gauldin v. Shehee*, 20 Ga. 531.

arising out of misrepresentation cannot be extended to a statement of the law which turns out to be an incorrect statement. It would not be just to hold a party liable for a mistaken legal opinion. "The law is not as yet an exact science, notwithstanding the lifelong labor and earnest zeal of judges of the court of appeals and justices of the supreme court; and even their opinions are not always deemed by their fellows as absolutely conclusive of the legal conclusions reached."²⁴ A declaration regarded as a statement of the law upon a particular subject, on which the right of recovery in such cases depends, is not actionable, though false. Under such circumstances a man has no right to rely, except at his peril, upon the representation of another whose interests are adverse, as to what the law will or will not do, or will or will not permit to be done. Common prudence and common sense should be, in all ordinary cases, sufficient safeguards against frauds of that character, and in the absence of exceptional circumstances, the false statement gives no right of action.²⁵ Thus, where the party signs the contract he intended to sign without any mistake as to the facts, but in law incurs a greater liability than he expected or than was represented to exist, the misrepresentation as to matters of law is no defense, for the reason that the truth or falsehood of the representation could have been tested by ordinary vigilance and attention.²⁶ A representation by a vendor that dower only at-

²⁴ *Unckles v. Hentz*, 18 Misc. Rep. 644, 43 N. Y. Supp. 749.

²⁵ *Steamboat Belfast v. Boon Co.*, 41 Ala. 50; *McDonald v. Smith* (Ark.), 130 S. W. 515; *People v. Supervisors*, 27 Cal. 655; *Choate v. Hyde*, 129 Cal. 580, 62 Pac. 118; *Fish v. Cleland*, 33 Ill. 238; *Platt v. Scott*, 6 Blackf. (Ind.) 389, 39 Am. Dec. 436; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357; *Jaggar v. Winslow*, 30 Minn. 263, 15 N. W. 242; *Du Moulin v. Board of Education of New York*, 124 N. Y. Supp. 901; *Corbett v. McGregor* (Tex.

Civ. App.), 131 S. W. 422; *Parker v. Raleigh Sav. Bank*, 152 N. C. 253, 67 S. E. 492; *Gormely v. Gymnastic Assn.*, 55 Wis. 350, 13 N. W. 242; *Lewis v. Jones*, 4 Barn. & C. 506; *Rashdall v. Ford*, L. R. 2 Eq. Cas. 750; *Gipe v. Pittsburgh, C. C. & St. L. Ry. Co.*, 41 Ind. App. 156, 82 N. E. 471; *McKenzie v. Dwight*, 2 O. R. (Ont.) 366, 11 A. R. (Ont.) 381.

²⁶ *Fish v. Cleland*, 33 Ill. 238; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Mutual Life Ins. Co. of New York v. Phinney*, 178 U. S. 327, 44 L. Ed. 1088, 20 Sup. Ct. Rep. 906; *Vallier v. Lee* (Ont.), 2 Gr. 606.

tached to lands of which he died seised and not to those sold during his life is so easily capable of refutation as not to constitute a fraud,²⁷ or as to the liability to assessment of a stockholder,²⁸ or as to the construction of a contract.²⁹ When the trustees of the National Lead Trust represented that the trust was legally organized and empowered to issue certificates of shares, and the plaintiff bought shares on the faith of the representation, no action lay for the falsity of the conclusion of the trustees on the question of law.³⁰ A false statement as to a difficult question of copyright law comes within the pale of protection on the same ground,³¹ and a statement by an intending purchaser to the wife of the vendor that her husband was about to sell land in which she was interested, and that he had the right to convey it, was held not to be such a misrepresentation as to give her ground to have the conveyance set aside for fraud.³² When a party alleged that her attorney gave her erroneous advice as to her legal rights, and acting thereon, she bid double the value of certain lots at a judicial sale thereof, the court would not relieve her from the consequences of the mistake in law;³³ and where executors represented that "a certain decree is now in full force and effect and no appeal has been taken therefrom," when in fact certain legatees had, eight days before, sued out a writ of error to review it, though they did not cause the same to be made a *supersedeas*, no charge of fraud could be sustained against the executors for such representation.³⁴ The moment, however, the misrepresentation is found to relate both to matters of fact and law, the rule of protection has no application. Where the heir at law of a shareholder in a company, the shares of which were personal estate, being ignorant of that circumstance, and supposing him-

²⁷ Martin v. Wharton, 38 Ala. 637.

²⁸ Upton v. Tribilcock, 91 U. S. 45,
23 L. Ed. 203; Rogan v. Illinois T. &
S. Bank, 93 Ill. App. 39.

²⁹ Bilafsky v. Conveyancers' Title
Ins. Co., 192 Mass. 504, 78 N. E. 534.

³⁰ Unckles v. Hentz, 18 Misc. Rep.
644, 43 N. Y. Supp. 749.

³¹ Brady v. Edwards, 35 Misc. Rep.
435, 71 N. Y. Supp. 972.

³² McDonald v. Smith (Ark.), 130
S. W. 515.

³³ Fraser v. Fraser, 128 Ill. App. 73.

³⁴ Fraser v. Fraser, 149 Ill. App.
186.

self to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, he was entitled to have his execution of the deed canceled, as having been obtained under a mistake of fact and law.³⁵ When an administratrix, on the representation made, fraudulently or in mistake of law that certain notes made by her intestate were unpaid and valid and in full force in law against the estate, gave her bond in settlement, she was entitled to relief on the ground of the mistake being both of law and of fact.³⁶ Where a person who took from another a bill of exchange procured it by a false statement that it was an ordinary note, when he knew it to be a bill of exchange, and the party giving the bill did it in ignorance that it was a bill of exchange, and, trusting in the statement made to him, was misled by it, the party so giving the bill would be entitled to relief, to the extent of the injury done by the fraud, as against an indorsee who did not pay value.³⁷ If the defendant was in fact ignorant of the law, and the other party, knowing him to be so, and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud.³⁸ A false representation that a trust deed is a first lien upon premises and that there are no prior mortgages or trust deeds upon them is such a mixed representation of law and fact as entitled the party to whom the representations were made to recover;³⁹ and where a plaintiff, upon a statement of the defendant, who obtained her signature to a quitclaim deed of her land, that the deed did not affect her land, and if it did he would make it good, executed the deed, she was entitled to recover the value of the land which he had sold to a third person.⁴⁰ A statement, that one has a landlord's lien on another's property superior to that of others, is a mixed one of law and

³⁵ *Broughton v. Hutt*, 3 De Gex & J. 501, 44 Eng. Rep., Full Reprint, 1361.

³⁶ *Brown v. Rice*, 26 Gratt. (Va.) 467.

³⁷ *Ross v. Drinkard's Admr.*, 35 Ala. 434.

³⁸ *Townsend & Milliken v. Cowles*, 31 Ala. 428.

³⁹ *Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158, 71 N. E. 347.

⁴⁰ *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85.

fact.⁴¹ Where the holder of certain recorded tax deeds falsely informed the owners of property that she had the paramount title, and upon their reliance upon her representation, obtained from them a conveyance of the land, notwithstanding that she knew, or should have known, that such representation impliedly carried the idea that the land was vacant and unoccupied at the time of the recording of her tax deeds and for the statutory period of three years thereafter, it was held to be no sufficient answer to the claim for relief against her that the representation was made honestly and under a *bona fide* mistake.⁴² The rule, further, does not apply where a party professes to know what the foreign law is, and falsely represents such law, misleading the person with whom he is dealing, since foreign law is treated as a matter of fact;⁴³ and where the relation of the parties is one of confidence and trust, misrepresentation as to the law may be fraudulent.⁴⁴ The rule as to misrepresentations of law is not the same where a fiduciary relation exists as it is where there is no such relation between the parties. Courts of equity look with suspicion upon any transaction by which a person occupying a relation of trust and confidence toward another obtains any benefit from the confiding party, and under some circumstances in such cases will set aside a transaction on the ground that a confidential relation existed, whether the representations were as to facts or the law.⁴⁵

⁴¹ Texas Cotton Products Co. v. Denny Bros. (Tex. Civ. App.), 78 S. W. 557; Hill v. Coates, 127 Ill. App. 196.

⁴² Kathan v. Comstock, 140 Wis. 427, 122 N. W. 1044.

⁴³ Bethell v. Bethell, 92 Ind. 318; Wood v. Roeder, 50 Neb. 479, 70 N. W. 21; Schneider v. Schneider, 125 Iowa, 1, 98 N. W. 159.

⁴⁴ Jaggar v. Winslow, 30 Minn. 263, 15 N. W. 242; Lehman v. Shackelford, 50 Ala. 437; Adair v. Brimmer, 74 N. Y. 539, 5 Morr. Min. Rep. 682; Hubbard v. McLean, 115 Wis. 9, 90

N. W. 1077; Stephens v. Collison, 249 Ill. 225, 94 N. E. 664.

⁴⁵ 1 Story, Eq. Jur., §§ 218, 308-338; Pom. Eq. Jur., §§ 955, 956; Bisham's Principles of Equity, §§ 212, 231-238; 14 Am. & Eng. Ency. of Law, pp. 54, 57; 20 Cyc. 34; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Thiede v. Startzman, 113 Md. 278, 77 Atl. 666; Stephens v. Collison, 249 Ill. 225, 94 N. E. 664; Gugel v. Hiscox, 138 App. Div. 61, 122 N. Y. Supp. 557.

§ 27 (23). **Presumption that men know the consequences of their own acts—In criminal cases.**—Another rule, owing its origin to the same source as the last, is that men of sound mind are presumed to intend the natural and necessary consequences of acts which they intentionally perform. This rule is stated by different standard authorities in different ways, and its variations are as numerous as those of the presumption already discussed, that everyone is supposed to know the law. Greenleaf says: "Though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty, yet it is a rule equally sound that every sane person must be supposed to intend that which is the ordinary and natural consequences of his own purposed act."⁴⁶ Lawson says: "Where an act is criminal *per se*, a criminal intent is presumed from the commission of the act."⁴⁷ In the varied forms in which the presumption is expressed it stands to reason that some confusion of statement among the adjudications on the subject should creep in, but they do not affect the substance of the rule which may be accepted as laid down in this section. For example, we find it expressed that when a person perpetrates an act, he is presumed to have foreseen and intended the result.⁴⁸ A criminal intent is generally an element of crime; but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does.⁴⁹ A man, it seems, intends that consequence which he con-

⁴⁶ 3 Greenl. Ev., 15th ed., 13.

⁴⁷ Lawson on Presumptive Evidence, 327, rule 65.

⁴⁸ Cupps v. State, 120 Wis. 504, 513, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; see, also, criticism in 2 Whart. Ev., § 1258.

⁴⁹ Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, 250; State v. Hand, 1 Marv. (Del.) 545, 41 Atl. 192; State v. Moore (Del.), 74 Atl. 1112; State v. Blackburn (Del.), 75 Atl. 536; State v. Truitt (Del.), 5 Penne. 466, 62 Atl. 790; Parrish v. Commonwealth, 136 Ky. 77, 123 S. W.

339; State v. Patterson, 116 Mo. 505, 22 S. W. 696; People v. Kathan, 136 App. Div. 303, 120 N. Y. Supp. 1096; Wells v. Territory, 14 Okl. 436, 78 Pac. 124; State v. Smith, 55 Or. 408, 106 Pac. 797; Harrison v. Commonwealth, 79 Va. 374, 52 Am. Rep. 634; State v. Abbott, 64 W. Va. 411, 62 S. E. 693; State v. Miele (Del.), 74 Atl. 8; State v. Moore (Del.), 74 Atl. 1112; State v. Blackburn (Del.), 75 Atl. 536; State v. Pepe (Del.), 76 Atl. 367; Requa v. Maillonn (New Brunswick), 3 Pug. 493; Reg. v. Tower, 4 P. & B. 168.

templates and which he expects to result from his act, and he, therefore, must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does.⁵⁰ Notwithstanding the compelling force of the reason underlying this, it has often been subjected to a criticism which has challenged its necessity. It has, however, withstood the attacks, safe on its foundation both of authority and public policy. It will readily be seen that were no such presumption raised, crime would still more often go unwhipped of justice, and the criminal could carry his "I didn't mean it" as a safe and certain talisman to keep him immune from the consequences of his misdemeanor. One who knowingly utters a forged bill is presumed to intend to defraud;⁵¹ and the presumption is conclusive, for the accused cannot set up the defense that he intended to pay such forged bill at its maturity.⁵² If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. If the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed such consequence was intended. Where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or do him some great bodily harm, is a necessary conclusion from the act.⁵³ One who willfully sets fire to the property of another is presumed to have intended to injure the owner of such property.⁵⁴ There is an old case⁵⁵ wherein it was held that setting fire to a jail by a prisoner merely for the purpose of effecting his escape was not arson, nor the willful burning of an inhabited dwelling-house within the statute at that

⁵⁰ *State v. Malloy*, 34 N. J. L. 410;
People v. Petheram, 64 Mich. 252, 31
 N. W. 18.

⁵¹ *King v. Sheppard*, Russ. & R. C.
 C. 169.

⁵² *Reg. v. Hill*, 2 Moody C. C. 30.

⁵³ *Commonwealth v. York*, 9 Met.
 93, 43 Am. Dec. 373, 377.

⁵⁴ *Rex v. Tarrington*, Russ & R. C.
 207.

⁵⁵ *People v. Cotteral*, 18 Johns. (N.
 Y.) 115.

time (1820) in force, although the jail was to be deemed an inhabited dwelling-house within the act. With all respect for the age of the case, it cannot be relied upon as good law. Carried to a logical conclusion, if the prisoner had killed his guard "merely for the purpose of effecting his escape," he could not have been convicted of murder. A charge to the jury in the following words was properly held to be nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act: "The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design that it is not necessary to prove that such design existed for any definite period before the fatal blow was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period of time inappreciably distant."⁵⁶ Without such a salutary and stringent rule, founded not alone on public policy but on the elementary basis of the necessary protection to society, the companion presumption of knowledge of the law would also fail, and this very bulwark of the constitutional aegis safeguarding person and property would be swept away. But this by no means extends to the consequences of accidental or unavoidable acts. Anything done accidentally cannot have been done intentionally. It is the spirit or intent that governs. No case or principle can be found subjecting an individual to liability for an act done without fault on his part. All the cases concede that an injury arising from inevitable acci-

⁵⁶ *Allen v. United States*, 164 U. S. 492, 41 L. Ed. 528, 529, 17. Sup. Ct. Rep. 154.

dent, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against; is but the misfortune of the sufferer, and lays no foundation for legal responsibility;⁵⁷ or, as put in other cases,⁵⁸ if the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie.

Where one threw a rock at another but missed him and struck an object a short distance on one side, and set up the defense that a person is presumed to intend the probable consequences of his act, and that the defendant should be presumed as intending to miss the complainant and not to hit him, the court properly dismissed the specious contention as leading to an absurd proposition.⁵⁹ Lying midway between these two propositions are such cases as include the intent to perpetrate one unlawful act and by mischance another unlawful act is committed which was not in the immediate contemplation of the wrongdoer. It is a general rule in criminal proceedings, at common law, that the defendant cannot be convicted unless a criminal intent is shown, but it is not necessary that he should have intended the particular wrong which resulted from his act. If he intends to do an unlawful and wrongful act, which is punishable because it is wrong in itself, and in doing it he inflicts an unforeseen injury, he is criminally liable for that injury. It is a familiar rule that one who shoots, intending to hit A, and accidentally hits and injures B, is liable for an assault and battery on B. This principle is equally applicable to other cases where a personal injury results from a wanton or reckless act which is likely to do bodily harm, or from any gross negligence which causes the danger.⁶⁰

§ 28 (23). **Same — In civil cases.**—This presumption called into being for the regulation of a community with

⁵⁷ *Harvey v. Dunlop*, Supplement to Hill & Denio (N. Y.), 193.

⁵⁸ *Wakeman v. Robinson*, 1 Bing. 213; *Bullock v. Babcock*, 3 Wend. 391.

⁵⁹ *State v. Hersom*, 90 Me. 273, 38 Atl. 160.

⁶⁰ *Commonwealth v. Hawkins*, 157 Mass. 551, 32 N. E. 862.

any claim to civilization could not possibly be limited only to criminal cases, although they call for its most frequent application. It has equal force and obtains with equal reason in civil cases. This is manifested in many actions of tort where the question of intent is material and the only mode of determining what was in the mind of the defendant is an inference to be drawn from his acts or conduct. Very often the act itself is the chief or sole proof of the intention with which it is done. In an authoritative textbook dealing with consequences in their relation to torts,⁶¹ the subject is appropriately discussed at greater length than can be given to it here, and we are indebted to it for some of our illustrations. In the well-known "Squib" case,⁶² Shepherd threw a lighted squib into a building full of people, doubtless intending to do mischief of some kind. It fell near one who, by instant and material act of self-protection, cast it from him. A third person did the same. In this third flight the squib struck the plaintiff, and exploding destroyed one eye of the plaintiff. Now, the defendant neither threw the squib at the plaintiff nor intended such grave harm to anyone; but he was none the less liable to the plaintiff. In other cases of tort it will be found that the tort-feasor is liable for the consequences of his act, and this liability is consonant with common sense. As Sir Frederick Pollock puts it, "He went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end."⁶³ It is always instructive and interesting to see how Blackstone dealt with a subject, and under the heading of "Trespass on the Case" he says: "It is a settled distinction that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action *vi et armis*; but where there is no act done, but only by a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally,

⁶¹ Webb's Pollock on Torts, enlarged American edition.

⁶³ Webb's Pollock on Torts, enlarged American edition, p. 35.

⁶² Scott v. Shepherd, 2 W. Bl. 892, and in 1 Smith Lead. Cas.

there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.”⁶⁴ There are many similar American cases. Where one without provocation threw some mortar at another and a part of it struck an innocent third person and injured him, though there was no intention to do the injury, and the act was done in sport but intentionally,⁶⁵ the defendant was held liable for the damages caused by the assault and battery.⁶⁶ Where B seized A by the arm, swung him around violently and let him go, thereby throwing him against C, who instantly pushed him away and against a hook which injured him, A successfully maintained action of trespass against B.⁶⁷ If the injury is inflicted by the act at any moment of its progress from the commencement to the termination thereof, then the injury is direct and immediate; but if it arises after the act has been completed, but occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence for which the perpetrator is liable.⁶⁸ Where a belligerent cruiser chased a neutral vessel, supposing her to be an enemy, and through negligence ran her down in the night and sank her, trespass lay for the damages sustained.⁶⁹ The thrower of a firecracker ignited in sport, and which, falling under a horse’s feet, frightened the horse so that it ran away and was killed, was liable for the consequences of his act, though an infant.⁷⁰ The publisher of a libel is presumed to have acted intentionally and to have intended injury;⁷¹ and if the acts of an insolvent debtor actually give a preference to certain creditors, the intention to give such preference is presumed.⁷² The intention

⁶⁴ Cooley’s Bl. Com. 122.

⁷⁰ Conklin v. Thompson, 29 Barb.

⁶⁵ Adams v. Waggoner, 33 Ind. 531, 218.

⁵ Am. Rep. 230.

⁷¹ Haire v. Wilson, 9 Barn. & C. 643; Morse v. Times-Republican Printing Co., 124 Iowa, 707, 100 N. W. 867; Holmes v. Jones, 147 N. Y. 59, 49 Am. St. Rep. 646, and note, 41 N. E. 409.

⁶⁶ Peterson v. Haffner, 59 Ind. 130,

²⁶ Am. Rep. 81.

⁶⁷ Ricker v. Freeman, 50 N. H. 420,

⁹ Am. Rep. 267.

⁶⁸ Jordan v. Wyatt, 4 Gratt. 151,

⁴⁷ Am. Dec. 720.

⁶⁹ Percival v. Hickey, 18 Johns.

²⁵⁷, 9 Am. Dec. 210.

⁷² Denny v. Dana, 2 Cush. (Mass.) 161, 48 Am. Dec. 655; McCurdy v. Grant, 32 Nova Scotia, 520.

to defraud creditors is presumed where a heavily embarrassed debtor makes a voluntary conveyance of all his property.⁷³ Generally, the rule may now be taken to be that the original wrongdoer is responsible for all the consequences which succeed his act and each other in unbroken sequence, without any intervening sufficient cause, and this liability exists whether the result was foreseen or the fact that some injury would result from his act might, by the exercise of ordinary care, have been foreseen.⁷⁴ In an interesting and important New York case,⁷⁵ the chain of events was singularly dramatic. The railroad company ran an engine on an elevated track; fire fell from the engine on to a horse and its driver who were passing beneath; the horse bolted; the driver, in his efforts to stop the frightened animal from colliding with a street post, pulled it on to the curbstone; this did not stop the horse, however, the driver was thrown out and the uncontrolled animal ran with the vehicle over the plaintiff. The railroad company was held liable, although the injury to the plaintiff would not have happened if the driver had not caused the horse to swerve on to the curbstone, the injury being directly attributable to the defendant's conduct in dropping the burning cinders, for the natural consequences of which act the defendant was responsible. So long as those consequences are not so remote as to have no direct connec-

⁷³ *Kaine v. Weigley*, 22 Pa. 179; and the following Canadian cases: *Davidson v. Ross*, 24 Gr. 22; *Cole v. Porkous*, 19 A. R. 111; *Lawson v. McGeoch*, 20 A. R. 464; *Campbell v. Barrie*, 31 U. C. R. 279; *Evans v. Ross*, 30 C. P. 121; *Bank of Toronto v. McDougall*, 15 C. P. 475; *Forest v. Girouard*, Q. R. 33 S. C. 193.

⁷⁴ *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44, 19 L. Ed. 65; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Missouri Pac. Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641; *Herrick v. Quigley*, 101 Fed. 191, 41 C. C. A. 294; *The Indrani*, 101 Fed. 598, 41 C. C. A. 511;

Myers v. Chicago etc. Ry. Co., 101 Fed. 919; *Choctaw etc. R. R. v. Holloway*, 114 Fed. 462, 52 C. C. A. 260; and a long line of cases ranging from *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, to *Winters v. Baltimore & O. R. Co.*, 177 Fed. 44, 100 C. C. A. 462. See, also, *Wells v. Territory*, 14 Okl. 436, 72 Pac. 124; *State v. Virginia Carolina Chemical Co.*, 71 S. C. 569, 51 S. E. 455, and cases collected in 22 Am. & Eng. Ency. of Law, p. 1235; and 16 Cyc. 1081.

⁷⁵ *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608.

tion with the act, the defendant is liable in tort for all the consequences of an illegal act.⁷⁶

§ 29 (24). **Presumptions as to malice**—In criminal cases.—Formerly, it was held to follow in logical sequence that if the presumption exists that everyone is supposed to know the law, and to know the legal effects of his acts, *a fortiori* the presumption of malice must arise in those crimes where malice is an ingredient. In speaking, in a legal work, of malice, it must be borne in mind it is not used in its popular sense of hatred, ill-will, or hostility to another, but rather of all acts done with an evil disposition, a wrong and unlawful motive or purpose, or the willful doing of an injurious act without lawful excuse. The subject has been most frequently discussed in the consideration of homicide, but what is said there of the presumption which the law raises applies equally to every act made punishable as a crime in which the malicious intent forms a part.⁷⁷ An English judge⁷⁸ thus gives the legal description of malice in contradistinction to the popular sense, in which the term is more commonly used: “Malice, in common acceptation, means ill-will against a person; but in its legal sense it means, a wrongful act, done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of malice because it is intentional and without just cause or excuse.” This presumption of malice, from a wrongful and injurious act willfully done, when applied to homicide, was not technical, or artificial, or invented for the particular occasion, but was the result of a mode of

⁷⁶ Sneesby v. L. & Y. R. Co., L. R. 9 Q. B., at p. 268.

⁷⁴³; Rigsby v. State (Ind.), 91 N. E. 925.

⁷⁷ State v. Russo (Del.), 77 Atl.

⁷⁸ Bayley, J., in Bromage v. Prosser, 4 Barn. & C. 255.

legal reasoning which is of general application.⁷⁹ The broad rule that malice will be presumed from the mere fact of homicide was very positively stated by the early English commentators.⁸⁰ Blackstone gives it⁸¹ that "All homicide is presumed to be malicious until the contrary appeareth in evidence." This view is not taken now with the same solemn acceptance as in the days of old. A more common sense and humanitarian interpretation has marked its adoption in this country. The majority of homicides are not, as a fact, malicious, but occur through misadventure, or under circumstances which reduce the offense to manslaughter, so that a legal presumption of malice seems inconsistent with the general doctrines of the criminal law. Cooley, in his edition of Blackstone, draws attention to this, and refers to an excellent review of a famous criminal cause.⁸² Other and equally important ground for hesitation in accepting the unqualified rule is that it places the burden of proof on the defendant contrary to the presumption of innocence,⁸³ and that it arbitrarily assumes not only that the homicide is unlawful, but of the most aggravated character known to the law.⁸⁴ In one case, at least, the presumption is repudiated, and that in no uncertain language,⁸⁵ and the rule as we have given it is quoted and challenged. "Courts and commentators have, especially of late, denied it as a sound legal principle, and condemned it as an excrescence upon the law. The true rule, more accurately stated, and which does not conflict with the presumption of innocence, the burden of proof, nor as to reasonable doubt, we think, is that malice may be implied from the intentional killing, where the jury, from the whole case before them, and beyond a reasonable doubt, find the additional fact that no circumstances of justification or excuse appear, and when there are no circumstances mitigating

⁷⁹ *Commonwealth v. York*, 9 Met. (Mass.) 93, 105, 43 Am. Dec. 373.

⁸⁰ *East P. C.*, p. 224.

⁸¹ 4 Bl. Com. 201. The Canadian rule is discussed in *Reg. v. McDowell*, 25 U. C. R. 108.

⁸² *Review of the Trial of Prof.*

Webster, by Hon. Joel Parker, *North American Review*, No. 72, p. 178.

⁸³ See *post*, § 103 (102).

⁸⁴ See article *N. A. Rev.*, No. 72, p. 178; *Territory v. Lucero*, 8 N. M. 543, 46 Pac. 18.

⁸⁵ *Territory v. Lucero*, 8 N. M. 543, 46 Pac. 18, 21.

the killing to that of manslaughter. If there is reasonable doubt as to justification, there is reasonable doubt as to malice." The evidence of the killing may be used to ascertain whether it was done in malice, but at the present day it would be error⁸⁶ to instruct a jury on the lines of Blackstone that killing alone is presumptive evidence of malice. A very eminent criminal lawyer⁸⁷ has said that such an apothegm belongs to the realm of purely speculative jurisprudence, and that the idea of abstract malice being presumed from the abstract killing has no application to cases actually before the court, where the facts of the killing must be proved. If the proposition be correct, proof of the killing not only raises the presumption of malice, but such presumption would become proof beyond a reasonable doubt, as a matter of law, unless the defendant successfully assumed the burden of showing the contrary. Such a proposition overturns the fundamental principles of the criminal law.⁸⁸ The presumption of malice is always overborne by that of innocence, and it likewise always rests with the prosecution to prove the malice;⁸⁹ while there is a multitude of cases⁹⁰ which have adopted the rule that in the absence of explanatory circumstances tending to rebut it, a presumption of malice or intent to kill arises from an apparently intentional killing, or a killing by acts the natural and ordinary result of which would be death, and that malice is presumed when an intentional homicide is proved and no justification or excuse or circumstances of mitigation appear in the evidence;⁹¹ and that in such cases

⁸⁶ Whart. Cr. Ev., § 738.

⁸⁷ Whart. Cr. Ev., § 737.

⁸⁸ Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908; Sparf v. United States, 156 U. S. 51, 39 L. Ed. 343, 15 Sup. Ct. Rep. 273; Coffin v. United States, 156 U. S. 432, 13 L. Ed. 481, 15 Sup. Ct. Rep. 394; People v. Willett, 36 Hun (N. Y.), 500; Davis v. United States, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 358.

⁸⁹ State v. McDonnell, 32 Vt. 491; People v. Ah Gee Yung, 86 Cal. 144,

24 Pac. 860; State v. Deschamps, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; State v. Cross, 42 W. Va. 253, 24 S. E. 996.

⁹⁰ Whart. Hom., 3d ed., § 99.

⁹¹ Oliver v. State, 17 Ala. 587; State v. Gillick, 7 Iowa, 287; Clarke v. State, 35 Ga. 75; Murphy v. People, 37 Ill. 447; Commonwealth v. Drew, 4 Mass. 391; Mitchell v. State, 5 Yerg. (Tenn.) 340; State v. Willis, 63 N. C. 26; Green v. State, 28 Miss. 687; Spies v. People, 122 Ill. 1, 3 Am. St.

the killing is at least presumed to be unlawful; though it may not, under some of the authorities, be presumed to be murder in the first degree under the statutes.⁹² The question is one of logic rather than of formal law. If the circumstances attending the homicide are fully shown by the evidence either for the prosecution or defense, and circumstances of excuse appear, there is no presumption of malice. Where all the circumstances of the homicide are given in evidence, the burden remains on the prosecution throughout the case.⁹³ In a celebrated case, where all the details of a homicide were given in evidence, the jury were instructed in substance that, as the homicide was conceded, the law implied a motive, and consequently the crime of murder in the first degree, and that they should find the prisoner guilty unless he had given evidence satisfying them that it was manslaughter or excusable homicide. This was held error on the ground that it improperly placed the burden of proof upon the defendant, and that there was no presumption under the circumstances of the specific intent involved in the statute. The burden of proving his defense must not be shifted upon the prisoner and deprive him as to that defense, of the benefit of a reasonable doubt. While there is no legal implication of the crime of murder from the bare fact of a homicide, the jury may infer it as a fact, and may do so even though no motive is assigned for the act and the case is bare of circumstances of explanation.⁹⁴ Wigmore says: "The various acts constituting the outward part of a crime are sometimes said to constitute a presumption of malice or criminal intent. But most of these instances are to-day understood to be either conclusive presumptions—i. e., rules of substantive law defining the criminal act—or else

Rep. 320, 12 N. E. 865, 17 N. E. 898; *Martinez v. State*, 30 Tex. Cr. App. 129, 28 Am. St. Rep. 895, 76 S. W. 767. See, also, *Commonwealth v. Hawkins*, 3 Gray (Mass.), 463; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

⁹² *Hill v. Commonwealth*, 2 Gratt. (Va.) 594.

⁹³ *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *Commonwealth v. Hawkins*, 3 Gray (Mass.), 463, and cases cited above.

⁹⁴ *People v. Conroy*, 97 N. Y. 62; *People v. Downs*, *supra*; *Stokes v. People*, 53 N. Y. 164.

mere inferences of fact, not affecting the accused with a duty to produce evidence.”

§ 29a (24). Same—In criminal cases—The modern rule. The true rule as to presumption of malice in homicide cases appears to be that all the facts of the case, taken together, are to be considered, and from these the question to be decided is whether the defendant acted maliciously.⁹⁵ Included in such facts may be the previous good reputation of the accused, as tending to rebut the presumption of malice arising from the killing, the jury thus being able to consider its weight.⁹⁶ Affirmative defenses raised by the accused attach to him the burden of proving them,⁹⁷ and when the accused admits the killing but attempts either to justify or extenuate, he undertakes to establish his defense to that extent.⁹⁸

§ 29b (24). Presumptions as to malice—In civil cases. The law in civil actions does undoubtedly recognize the presumption of malice from certain wrongful acts; but such presumptions arise less frequently in civil than in the consideration of criminal cases by reason of their nature. Thus malice is presumed from the deliberate publication of a libel or slander;⁹⁹ for in those cases malice is

⁹⁵ Whart. Hom., 3d ed., § 99; *Yates v. State*, 26 Fla. 484, 7 South. 880; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Territory v. Lucero*, 8 N. M. 543, 46 Pac. 18; *Commonwealth v. Green*, 1 Ashm. (Pa.) 289.

⁹⁶ *People v. Casey*, 53 Cal. 360.

⁹⁷ *State v. Silverio* (N. J. Err. & App.), 76 Atl. 1069; *State v. Morahan* (Del.), 77 Atl. 488; *State v. Borelli* (Del.), 76 Atl. 605; *State v. Moore* (Del.), 74 Atl. 1112; *State v. Pepe* (Del.), 76 Atl. 367; *State v. Primrose* (Del.), 77 Atl. 717; *James v. State*, 167 Ala. 14, 52 South. 840.

⁹⁸ *State v. Silverio*, *supra*; *State v. Primrose*, *supra*; *State v. Russo*, *supra*; *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *Hawkins v.*

United States, 3 Okl. Cr. 651, 108 Pac. 561; *State v. Leo* (N. J. L.), 77 Atl. 523; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407. See, also, *State v. Chastain*, 85 S. C. 64, 67 S. E. 6; *State v. Strother*, 84 S. C. 503, 66 S. E. 877.

⁹⁹ *Morse v. Times-Republican Printing Co.*, 124 Iowa, 707, 100 N. W. 867; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, 41 N. E. 409, and note; *Smith v. Singles*, 6 Penne. (Del.) 544, 72 Atl. 977; *Burch v. Bernard*, 107 Minn. 210, 120 N. W. 33; *Mayo v. Goldman* (Tex. Civ. App.), 122 S. W. 449; *Levert v. Daily States Pub. Co.*, 123 La. 594, 131 Am. St. Rep. 356, 23 L. R. A., N. S., 726, 49 South. 206.

an essential ingredient. It must, in either, be expressly or substantially averred in the pleadings, and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice, until the proof, in the event of denial, be overthrown or the language itself be satisfactorily explained.¹⁰⁰ In actions for malicious prosecution, malice may be presumed from a total want of probable cause for the prosecution.¹ There need be no proof of malice in the popular sense, for in its legal sense any unlawful act done willfully and purposely to the prejudice of another is malicious.² As a rule, the creation of the presumption of malice, except in the instances cited and cognate cases, forms rather an element of criminal offense than of a civil wrong.

§ 30 (25). Presumptions as to regularity—General rule. The law presumes that every man, in his private and official character, does his duty until the contrary is proved; that officers will perform their duties according to law; and persons dealing with them may rely upon that presumption.³ Even though they have made previous declarations to the contrary,⁴ it will presume that the acts of such officers are valid;⁵ it will presume that all things are

¹⁰⁰ Dillard v. Collins, 25 Gratt. (Va.) 343, and cases *supra*.

¹ Webb's Pollock, on Torts, enlarged Am. ed., 393, n. 7, and cases there noted; White v. International Text Book Co., 144 Iowa, 92, 121 N. W. 1104; Moneyweight Scales Co. v. McCormick, 109 Md. 170, 72 Atl. 537; Bosch v. Miller, 136 Mo. App. 482, 118 S. W. 506; Barbour v. Gettings, 26 U. C. R. 544.

² King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; Selland v. Nelson (N. D.), 132 N. W. 220; Commonwealth v. Snelling, 15 Pick. (Mass.) 337; Byrket v. Monohon, 7 Blackf. (Ind.), 83, 41 Am. Dec. 212; Haire v. Wilson, 9 Barn. & C. 643; Fisher v. Clement, 18 Barn. & C. 472; Bodwell

v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228.

³ State v. Middle Kittitas Irr. Dist., 56 Wash. 488, 106 Pac. 203.

⁴ State v. Adcock, 225 Mo. 335, 124 S. W. 1100; Meisner v. Meisner, 32 Nova Scotia Rep. 326.

⁵ Payne v. Providence Gas Co., 31 R. I. 295, 77 Atl. 145; *In re City of New York*, 140 App. Div. 238, 125 N. Y. Supp. 210; Leonard v. Lennox, 181 Fed. 760; Grand Trunk Western R. Co. v. South Bend (Ind.), 91 N. E. 809; McNeil v. O'Brien, 204 Mass. 594, 91 N. E. 138; City of Syracuse v. Roscoe, 66 Misc. Rep. 317, 123 N. Y. Supp. 403; Edwards v. Kirkwood, 147 Mo. App. 599, 127 S. W. 378; Belcher v. Harr, 94 Ark. 221, 126

rightly done, unless the circumstances of the case overturn this presumption. This presumption was enshrined by the Romans in the maxim in use down to the present day, *Omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*. Presumptions like the one under discussion are indulged in by the law for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace and the security of private property. The law adopts this salutary principle in furtherance of those general rules of evidence by which presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances.⁶ It will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; and many other instances of the kind which shall come under the purview of this treatise and which are also well collected in Mr. Starkie's great contribution to the law on the subject.⁷ It will presume that an assessor did his duty in assessing property;⁸ that where land was bought sixty years previously at a sheriff's sale, the sheriff duly executed a proper deed to the purchaser;⁹ that election inspectors allowed only qualified electors to vote;¹⁰ that a deputy sheriff duly collected and accounted for taxes as it was his duty to do;¹¹ that the secretary of the

S. W. 714; *Flores v. Hovel* (Tex. Civ. App.), 125 S. W. 606; *Young's Admr. v. Chesapeake & O. R. Co.*, 136 Ky. 784, 125 S. W. 241; *Bacon v. Boston & M. R. Co.*, 83 Vt. 421, 76 Atl. 128; *Monk v. Farlinger*, 17 C. P. (Ont.) 41; *Hamilton School Trustees v. Neil*, 28 Gr. (Ont.) 408.

⁶ *Rex v. Hawkins*, 10 East, 211; *Powell v. Milbourne*, 3 Wils. 355; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10

Am. Dec. 345; *Graystock v. Bambart*, 26 A. R. 545.

⁷ 3 Stark, Ev., p. 4.

⁸ *Southland Lumber Co. v. McAlpin*, 126 La. 906, 53 South. 45; *People v. Hulin*, 237 Ill. 122, 86 N. E. 666.

⁹ *Coulson v. Scott*, 167 Ala. 606, 52 South. 436.

¹⁰ *Sullivan v. Orange County Commrs.*, 59 Fla. 630, 52 South. 517.

¹¹ *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 307.

interior had indorsed his approval on certain survey plats as required by law;¹² that the federal land officials would perform their duties regularly in making and canceling homestead entries;¹³ that sheriffs acted regularly in their offices and the officer serving a writ of replevin took the statutory bond;¹⁴ that county supervisors, auditors and other officials acted regularly in their offices.¹⁵ It will presume also that public officers will regularly and *bona fide* perform their duties,¹⁶ and that a public official will not act oppressively or unlawfully.¹⁷ The principle is that where acts are of an official nature or require the concurrence of official persons, a presumption arises in favor of their regularity. Stephen thus states the rule: "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."¹⁸ It is said this presumption is more often named than enforced, and that by reason of the indefiniteness of its scope, it is hardly capable of reduction to rules. "It may be said that most of the instances of its application are found attended by several conditions: first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncer-

¹² Rio Grande Western R. Co. v. Stringham (Utah), 110 Pac. 868.

¹³ Crawford County Bank v. Baker (Ark.), 130 S. W. 556.

¹⁴ Massachusetts Breweries Co. v. Herman, 106 Me. 524, 76 Atl. 943; San Francisco Sulphur Co. v. Aetna Indemnity Co., 11 Cal. App. 695, 106 Pac. 111; Shelton v. Franklin, 224 Mo. 342, 135 Am. St. Rep. 537, 123 S. W. 1084.

¹⁵ In re Drainage Dist. No. 3, Hardin County, 146 Iowa, 564, 123 N. W. 1059; Freeborn County v. Helle, 105 Minn. 92, 117 N. W. 153; Chelmsford

Foundry Co. v. Shepard, 206 Mass. 102, 92 N. E. 75.

¹⁶ People v. Montez, 48 Colo. 436, 110 Pac. 639; City St. Imp. Co. v. Kroh, 158 Cal. 308, 110 Pac. 933; State Board of Medical Examiners v. Taylor (Tex.), 129 S. W. 600; In re City of New York, 137 App. Div. 803, 122 N. Y. Supp. 656.

¹⁷ Schultz v. State, 112 Md. 211, 76 Atl. 592.

¹⁸ Stephen, Ev., art. 101; Co. Litt. 6b, 332; Broom, Leg. Max., 942. See § 31 et seq., *post*.

tainty; and finally, that the circumstances of the particular case add some element of probability.”¹⁹ While this presumption had its origin in respect to acts of an official and judicial character only, it will be seen during the discussion which follows that it is constantly applied in the courts to contracts and other acts of an unofficial character when such acts are not illegal or repugnant to natural right. It must always be borne in mind, however, that this presumption has of itself no probative force, and operates only in the absence of evidence.²⁰

§ 31 (26). Regularity of judicial proceedings—Jurisdiction.—The solemnity which attaches to judicial proceedings, and the care of the state in its judicial department that causes shall be conducted with almost inflexible regularity, are by no means ephemeral, but carry with them the presumption thereafter that such proceedings not only should have been, but were, regular in form and proper in conduct. Valuable rights, property and personal, often depend upon the presumption that judicial proceedings have been so regularly and properly conducted. This is both necessary and right after a lapse of time has rendered it sometimes extremely difficult, sometimes practically impossible, to furnish extraneous evidence that the requirements of the law have been in all respects complied with. A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law are in favor of its acts, and therefore such judgments as it renders are presumed to have been within its jurisdictional powers, at all events until the contrary appears. This presumption is not limited to the subject matter of the action, but extends to the parties to the action as well. “The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its

¹⁹ 4 Wigmore on Ev., § 2534.

²⁰ Board of Water Commrs. v. Robbins, 82 Conn. 623, 74 Atl. 938; Dimock v. New Brunswick Marine

Assur. Co., 1 All. (New Brk.) 398; Cossitt v. Cusack, 40 Nova Scotia, 446.

general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists, the latter will be presumed."²¹ The doctrine has been long since declared in a leading case as follows: "The rule for jurisdiction is this, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so."²² And this is true even though the proceeding is under a special statute.²³ "This rule has been fully upheld by the decisions in this country, and the doctrine is well settled that, in favor of a court of general jurisdiction, it is presumed that it had jurisdiction of the person of the defendant though that fact does not appear in the record."²⁴ The presumption of jurisdiction is raised not only where the record is silent, but also if it is incomplete or lost, unless, of course, it is rebutted.²⁵ It was held, in the absence of a bill of exceptions preserving the evidence, the supreme (or appellate) court will presume that every fact necessary to bring the case within the jurisdiction of the court and establish a cause of action was proven and established at the trial.²⁶ It must be presumed that if any valid defense

²¹ Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959; Spencer v. Lyman, 27 S. D. 471, 131 N. W. 802.

²² Peacock v. Bell, 1 Saund. 74. See, also, Kenny v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Royse v. Turnbaugh, 117 Ind. 539, 20 N. E. 485.

²³ In re Merchant's Estate, 121 Wis. 526, 99 N. W. 320.

²⁴ Foot v. Stevens, 17 Wend. (N. Y.) 483; Voorhees v. United States Bank, 10 Pet. (U. S.) 449, 9 L. Ed. 490; Bustard v. Gates, 4 Dana (Ky.), 435; Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355; Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; City of St. Louis v. Lanigan, 97 Mo. 175, 10 S. W. 475; Hempstead v. Cargill, 46 Minn. 141, 48 N. W. 686; Sichler v. Look, 93 Cal. 600, 29 Pac.

220; Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462; Howcott v. Smart, 125 La. 51, 51 South. 64; Wilson v. State, 3 Okl. Cr. 714, 109 Pac. 289; Otto v. Young, 227 Mo. 193, 127 S. W. 9; State v. First Judicial Dist. Ct., 40 Mont. 17, 104 Pac. 872; The Ship Poll Cary, 45 Ct. of Cl. (U. S.) 219; State v. Parish of Orleans, 128 La. 914, 55 South. 574.

²⁵ Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Yaeger v. City of Henry, 39 Ill. App. 21; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Crank v. Flowers, 4 Heisk. (Tenn.) 629; Tallman v. Ely, 6 Wis. 244.

²⁶ Tugboat E. P. Dorr v. Waldron, 62 Ill. 222; Goodrich v. City of Minonk, 62 Ill. 122; Davis v. Taylor, 41 Ill. 407; Morrison v. Albee, 2 All. 145.

is presented to the court at any time before the judgment, the party presenting it would have been allowed to make a showing thereof, although it might not have been contained in his original answer. As it would have been the duty of the court to permit the defense to be interposed, it must be presumed the court would have done so.²⁷ It will be seen that the rule includes those cases where the jurisdictional facts do not appear on the record. In an attempt to impeach the judgment collaterally, it will be presumed that the necessary facts existed; for example, that a necessary affidavit had been filed,²⁸ that preliminary rights have been waived,²⁹ that an appearance by an attorney was authorized;³⁰ that proper service had been made in default action where papers were lost or destroyed;³¹ that a special term of court held was duly convened and that legal notice of time and place had been given;³² a verdict as the foundation of a judgment, the minutes being lost;³³ that a sheriff's undated return was made within the proper time;³⁴ that an attorney was authorized to bring suit;³⁵ that a subpoena was served at the residence of the witness, where the witness stated her place of residence in an answering affidavit in proceedings to punish her for contempt;³⁶ after the lapse of twenty-five years that, the record being silent, the court had required a petitioner to comply with statutory requirements;³⁷ that

²⁷ *Swamp Land Reclamation Dist. No. 341 v. Blumenberg*, 156 Cal. 539, 106 Pac. 392.

²⁸ *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Bush v. Lindsey*, 24 Ga. 245, 71 Am. Dec. 117; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Weaver v. Brown*, 87 Ala. 533, 6 South. 354; *Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385; *Reinig v. Hecht*, 58 Wis. 212, 16 N. W. 548; *Prince v. Griffin*, 16 Iowa, 552.

²⁹ *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439.

³⁰ *Reynolds v. Fleming*, 30 Kan. 106, 46 Am. Rep. 86, 1 Pac. 61. See note, 126 Am. St. Rep. 33.

³¹ *Evans v. Young*, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464.

³² *Stockslager v. United States*, 116 Fed. 590, 54 C. C. A. 46.

³³ *American M. Co. v. Hill*, 92 Ga. 297, 18 S. E. 425.

³⁴ *New River Mineral Co. v. Roanoke C. & C. Co.*, 110 Fed. 343, 49 C. C. A. 78.

³⁵ *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

³⁶ *Ahrens v. Coleman*, 121 N. Y. Supp. 1121, 66 Misc. Rep. 569.

³⁷ *Swift v. Harbison-Walker Ref. Co.*, 228 Pac. 584, 77 Atl. 916.

a decree was rendered and entered regularly;³⁸ that a judge, in making two orders in a probate proceeding at the same time, did not intend one to nullify the other;³⁹ that in probate proceedings generally, when by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularities or irregularities of subsequent steps can only be questioned in some direct mode as prescribed by law. They are not matters for which the decree of the court can be collaterally assailed.⁴⁰ Generally, if parts of the record are lost, or if the record is silent on the subject of jurisdiction, or if its statements are incomplete or obscure on the subject, unless the want of jurisdiction is distinctly shown, it will be presumed.⁴¹ As to the regularity of court sessions above referred to, the general trend of all the authorities upon this point is that in all cases where it appears that it was possible and

³⁸ *Fiddymment v. Bateman*, 97 Ark. 76, 133 S. W. 192.

³⁹ *Young v. Chesapeake etc. R. Co.*, 136 Ky. 784, 125 S. W. 241.

⁴⁰ *Comstock v. Crawford*, 3 Wall. (70 U. S.) 396, 18 L. Ed. 34; *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462, 104 C. C. A. 210; *McNitt v. Turner*, 16 Wall. (83 U. S.) 353, 21 L. Ed. 341. For other illustrative cases, see *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405; *American Mortgage Co. v. Hill*, 92 Ga. 297, 18 S. E. 425; *Moore v. Neill*, 39 Ill. 256, 89 Am. Dec. 303; *Worley v. Hine-man*, 6 Ind. App. 240, 33 N. E. 260; *Hindorff v. Sovereign Camp*, 150 Iowa, 185, 129 N. W. 831; *State v. Parish of Orleans*, 128 La. 914, 55 South. 574; *Bryant v. Johnson*, 24 Me. 304; *Brown v. Hannah*, 152 Mich. 33, 115 N. W. 980; *Dyson v. State*, 26 Miss. 362; *Kolterman v. Chilvers*, 82 Neb. 216, 117 N. W. 405; *Philadelphia etc. R. Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356; *Rugg v. Spencer*, 59 Barb. (N. Y.)

383; *Johnson v. Mullin*, 12 Ohio, 10; *Wilson v. State*, 3 Okl. Cr. 714, 109 Pac. 289; *Ex parte Pearson*, 79 S. C. 302, 60 S. E. 706; *Spencer v. Lyman*, 27 S. D. 471, 131 N. W. 802; *Giddings v. Smith*, 15 Vt. 344; *In re Marchant*, 121 Wis. 526, 99 N. W. 320. See, also, the later cases: *Silverston v. Mercantile Trust Co.*, 18 Cal. App. 180, 122 Pac. 976; *Dist. of Columbia v. Jones*, 38 App. D. C. 560; *Spumey v. Hall* (Ind. App.), 97 N. E. 571; *Howell v. Sherwood*, 242 Mo. 513, 147 S. W. 810; *Whitcomb v. Manderville*, 90 S. C. 384, 73 S. E. 775; *State v. McQuillin* (Mo.), 151 S. W. 444; *In re Avenue etc.*, 138 N. Y. Supp. 107.

⁴¹ *Horner v. State Bank*, 1 Ind. 130, 48 Am. Dec. 355; *Coit v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Lawler v. White*, 27 Tex. 250; *Swearengen v. Gulick*, 67 Ill. 208; *Goar v. Maranda*, 57 Ind. 339; *Sharp v. Brunnings*, 35 Cal. 528; *Graves v. First National Bank*, 77 Tex. 555, 14 S. W. 163; *Yaeger v. City of Henry*, 39 Ill. App. 21.

competent for a court to have been in session on a given day, and there is nothing in the record to show that the terms and conditions authorizing a session have not been fully answered, it must be presumed that what was done by the court below was properly and legally done, and that the prerequisite steps necessary to constitute a legal court were taken.⁴²

§ 32 (27). **Presumptions not allowed to contradict the record.**—The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. The office of a presumption is to supply the evidence or averments respecting the facts presumed, and directly the evidence is disclosed or the averment is made, the presumption is *functus officio*. “When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.”⁴³ In other words, the rule is that no presumption can be allowed against the express statements of the record. For example, if it appears from the return of the officer or the proof of service in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place, or if it appear that the service was made upon some person not the defendant, it will not be presumed, in the silence of the record, that it was upon the defendant also. If the record states there was a default, it could not be presumed that a guardian *ad litem* had appeared for certain infant defendants.⁴⁴ “Were not this so, it would never be possible to attack collaterally

⁴² *Stockslager v. United States*, *supra*; 21 Ency. Pl. & Pr. 611, and authorities there cited; *Regina v. Fee*, 3 Ont. Rep. 107.

⁴³ *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, 963.

⁴⁴ *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."⁴⁵ The record cannot be contradicted; if it shows proceedings insufficient to sustain the judgment, nothing else can be presumed to better it—*expressio unius, exclusio alterius*.⁴⁶ The presumption, too, grows stronger with age. After a long lapse of time, it cures irregularity in judicial proceedings, and assumes that everything that was done was "solemnly and rightly done," and it also even presumes, in some rare cases, that an unfound record once existed. "But time can never authorize the presumption that an existing record, apparently complete and perfect, is not substantially what it always was, and especially that anything which it expresses or imports is false."⁴⁷ The presumption of correctness and indisputability also extends on the same principle to facts recited which confer jurisdiction. And by the weight of authority such recitals in a domestic judgment are so far conclusive that the law does not permit the introduction of extraneous evidence to rebut them in any collateral proceeding, except for fraud in the manner of obtaining the judgment.⁴⁸ While it is said that it is not permissible to contradict such recitals, it is an entirely different thing if the recitals as to jurisdiction are self-contradictory. In

⁴⁵ Galpin v. Page, *supra*.

⁴⁶ Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Forest v. Fly, 218 Ill. 165, 109 Am. St. Rep. 249, 75 N. E. 789; Hering v. Chambers, 103 Pa. 175.

⁴⁷ Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Brumbaugh v. Wilson, 82 Kan. 53, 107 Pac. 792; Swift v. Harbison-Walker Refractories Co., 228 Pa. 584, 77 Atl. 916.

⁴⁸ Granger v. Clark, 22 Me. 128; Cook v. Darling, 18 Pick. 393; Hartman v. Ogborn, 54 Pa. 120, 93 Am.

Dec. 679; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Maples v. Mackey, 89 N. Y. 146; Rogers v. Beauchamp, 102 Ind. 33, 1 N. E. 185; McCauley v. Fulton, 44 Cal. 355; Wilcher v. Robertson, 78 Va. 602. See, also, Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589, where the record contained a forged appearance of the defendant by attorney on his behalf. See, also, §§ 611, 616 et seq., *post*. See, also, the recent case of Burnham v. Hardy Oil Co. (Tex. Civ. App.), 152 S. W. 182 (presumption of disqualification of judge).

such cases the whole record will be examined, and if the inconsistency is such that it can be reconciled, or if the contradiction is only inferential, the recitals in the judgment showing jurisdictional facts will govern.⁴⁹ For example, the judgment of a court of general jurisdiction cannot be collaterally impeached on the ground that the court had no jurisdiction of the parties defendant, where the record shows a finding by the court that the defendants, by their attorney, came into court, and by virtue of his power of attorney filed in the court confessed judgment for the defendants for a specified sum, notwithstanding the power of attorney on file was not executed by some of the defendants, who were in fact at the time married women; for the power of attorney was no part of the record, and the finding showed the existence of jurisdiction.⁵⁰ Again, where the record shows affirmatively that the summons in the action in which the judgment was rendered was regularly served by publication within three years, and an affidavit of publication was sworn to within that period, though filed thereafter, and one day before the judgment, the recitals of the judgment, which are inconsistent with such filing after the lapse of three years, and which show that the defendant was regularly served with process, and that his default was duly entered according to law, must be taken as true, and to be based upon other proof, and the judgment cannot be held void upon its face upon collateral attack.⁵¹ In a comparatively old decision of the California supreme court,⁵² the subject was very clearly discussed, and the views then enunciated on this point have not been departed from. "To avoid any misapprehension, we deem it proper to add that, so far we have assumed, for the purposes of the argument, that the

⁴⁹ *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Turner v. Jenkins*, 79 Ill. 228; *Smith v. Wood*, 37 Tex. 616; *Treadway v. Eastburn*, 57 Tex. 209; *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

⁵⁰ *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448.

⁵¹ *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

⁵² *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and note, which contains the references to this case by other courts and where it has been criticised by the United States supreme court.

record, aside from that portion of it which is denominated the proof of service, is silent upon the question of service. But it may happen that other portions of the record may also speak upon that question. If so, what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it and report the responses of all its parts." Two excellent illustrations are afforded by the court in the case referred to.⁵³ Suppose that the judgment-roll shows in that part of it called the "affidavit or proof of service" that personal service was made upon a defendant's son, and the remainder of the roll says nothing further about service. There the face of the record shows its want of jurisdiction. But suppose the judgment states that the defendant appeared, or that personal service was made upon him or something that is equivalent thereto, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which might have been actually the case. The record does not for that reason blow hot and cold; on the contrary, both acts might have been done. On the return of service on the son, the court may have declared it no service, the father may then have been served, and the wrong return nevertheless found its way into the judgment-roll. To hold thus would be consistent with the record; to hold otherwise would be to contradict the record. Another excellent illustration is given in the same case. Suppose, in the case of service by publication, the affidavit of the printer says that the summons was published one month and the judgment states it was published three, or that service has been had upon the defendant; it will be presumed that other proof than that contained in the judgment-roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it.⁵⁴

⁵³ Hahn v. Kelly, *supra*.

⁵⁴ See, also, People v. Harrison, 84 Cal. 607, 24 Pac. 311; Whitney v.

Daggett, 108 Cal. 232, 41 Pac. 471; Ahrens v. Coleman, 66 Misc. Rep. 569, 121 N. Y. Supp. 1121.

§ 33 (28). Limitations of the rule—Service by publication.—We have dealt now with the presumption of the regularity of judicial proceedings, and have shown in what cases it is not allowed to contradict the record. There is another and important limitation. By the weight of authority the presumption is limited to the jurisdiction over persons within the territorial limits of the courts who can be reached by the process of the courts. Hence, under the statutes allowing service by publication on persons outside the state, no such presumptions are indulged. It is the prevailing rule that, since such proceedings are contrary to the course of the common law, the requirements of the statute must be strictly followed, and that defects and omissions are not to be aided by presumptions in favor of jurisdiction.⁵⁵ When, therefore, by legislation of a state,

⁵⁵ *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959; *Boyland v. Boyland*, 18 Ill. 551; *Neff v. Pennoyer*, 3 Saw. (U. S.) 274, Fed. Cas. No. 10,083; *Brownfield v. Dyer*, 7 Bush (Ky.), 505; *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389, 25 L. R. A. 806, 36 N. E. 837; *Rollins v. Maxwell Bros.*, 127 Wis. 142, 106 N. W. 677. From the exhaustive opinion of Mr. Justice Field in *Galpin v. Page*, *supra*, the following excerpts are particularly instructive: "The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. 'The authority of every judicial tribunal, and the obligation to obey it,' says Burge, in his Commentaries, 'are circumscribed by the limits of the territory in which it is established'; Com. on Colonial and Foreign Law, p. 1044. 'No sovereignty,' says Story, in his Conflict of Law,

'can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals': Sec. 539. And in *Picquet v. Swan*, 5 Mason, 40, Fed. Cas. No. 11,134, the same learned justice says: 'The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the court of king's bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland or the Colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This re-

constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party not a citizen of the state or found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling we believe of the courts of every state in the Union.⁵⁸

sults from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority.' In *Steel v. Smith*, Mr. Chief Justice Gibson, of the supreme court of Pennsylvania, after referring to the citations we have made from the treatises of Burge and Story, says: 'Such is the familiar, reasonable and just principle of the law of nations; and it is scarcely supposable that the framers of the constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty': 7 Watts & S. (Pa.) 451. Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment

or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it any length, had it not been impugned and denied by the circuit court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

⁵⁸ *Galpin v. Page*, *supra*, which also contains the following references: "It has been so held by the supreme court of California in repeated instances. In *Jordan v. Giblin*, 12 Cal. 100, decided in 1859, service of publication was at-

§ 33a (28). **Same—Apparently conflicting cases.**—But there are decisions which assert that there is no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while in the other this will be presumed if the record does not show to the contrary. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and

tempted, and the court said that it had already held, 'in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.' In *Ricketson v. Richardson*, 26 Cal. 149, decided in 1864, the court, referring to the sections of the statute authorizing service by publication, said: 'These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance.' In *McMinn v. Whelan*, 27 Cal. 300, decided in 1866, the plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This judgment was recovered against Maume and others, who were nonresidents of the state, upon service of summons by publication. It appeared from the record that a supplemental complaint had been filed in the action, and that the summons published was issued upon the original complaint, and not after that had been superseded by the supplemental com-

plaint. It was objected that the publication thus made was insufficient to give the court jurisdiction of the person of the absent defendants; the objection was answered by the position that the judgment could not be questioned collaterally, for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary. But the court held the objection well taken, and after referring to the case of *Peacock v. Bell*, in *Saunders*, 85 English Reports, Full Reprint, 84, said that that case 'involved the question of jurisdiction as to the subject matter of the action and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued.'" The principal case, *Galpin v. Page*, *supra*, has stood the test of years, and has been recognized as the authority for all the propositions referred to. In *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043, we find it

things may be brought within its reach, and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done, before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so arises from the fact that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal.⁵⁷ If "it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judgment is rendered, was, at the time of the alleged seizure, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit of protection of the judgment or decree."⁵⁸ If, however, the record shows that the defendant was a resident of the territory of the state within which

cited as authority to the proposition that a judgment *in rem* may be obtained against property within the jurisdiction of the court belonging to an absent nonresident, or when the property of the nonresident is attached, the court may in the suit dispose of the seized property against the nonresident; but it cannot go further and render a personal judgment against him, except one which can be enforced as to the seized property against such non-

resident. The courts universally hold that such personal judgment is void as to all matters and things except as to the disposition of the property seized. The long line of its citations can be traced down to *Copley v. Ball*, 176 Fed. 682, 100 C. C. A. 234.

⁵⁷ *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295. See, also, *Gemmell v. Rice*, 13 Minn. 400.

⁵⁸ *Galpin v. Page*, *supra*.

such a court sits, its process must be served upon him personally, and it ought to be presumed in such a case, nothing appearing in the record to show to the contrary, that personal service was made before the court entered a final decree or judgment. While these decisions are entitled to weight⁵⁹ the student is called upon to accept no arbitrary dictum that one case conflicts with another without subjecting the alleged conflict to his own analysis and satisfying himself. If he accepts the *obiter dicta* of some decisions, he will find himself hampered with a supposed contradiction to many legal propositions. In one of the cases which follow the Texas case referred to,⁶⁰ we find the court says: "Appellant contends that the rule is declared in *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, to be, that no presumption shall be indulged in favor of a judgment against a nonresident by publication. There are expressions in the opinion very much tending in that direction. But whatever may have been said in *Galpin v. Page* must yield to the later and better rule laid down in *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742, where it is said: 'Where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid.' " Now, so far from what was said in *Galpin v. Page* yielding to the so-called later and better rule in *Applegate v. Lexington etc. Min. Co.*, we find Mr. Justice Woods, who delivered the opinion of the court, saying:

⁵⁹ *Stewart v. Anderson*, *supra*, has been followed in a large number of cases and distinguished in very few. See 3 Notes on Texas Reports, 1910 ed., 828.

⁶⁰ *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036, which approves the Texas case, *Stewart v. Anderson*, *supra*.

“The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin v. Page*, 18 Wall. 350 (85 U. S. bk. 21, L. Ed. 959), cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See, also, *Pennoyer v. Neff*, 95 U. S. 727, 734 (bk. 24, L. Ed. 570, 572).” These cases do not conflict at all. They related to different sets of circumstances, and it is to be regretted that a little want of discrimination between them should lead to their possible confusion.⁶¹ To

⁶¹ A perusal of the syllabi of the two cases, so far as this discussion is concerned, will confirm this. Extract from syllabus in *Galpin v. Page*:

1. In a court of general jurisdiction, acting within the scope of its general powers, when jurisdiction of the subject matter exists and appears, jurisdiction of the person will be presumed when the record is silent as to the latter, but such presumption will be limited to persons within its territorial limits.

2. Where the record states facts showing that a defendant is without the territorial limits of the court, and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree.

3. When, by law of a state, constructive service of process by publication is substituted in place of personal citation against the person

sum up the two cases and to show the law as it stands, we have only to point out that *Applegate v. Lexington etc. Min. Co.*, referred to, decides that where publication or other substituted service is sufficient to bring in nonresident defendants, interested in local property, without the proof of service being placed upon the record, and the court orders such publication or other substituted service, it will be presumed that service was made as ordered—the presumption is in favor of the jurisdiction—but where, as in *Galpin v. Page* referred to, the law permits such publication or other substituted service only on certain facts being made to appear to the court upon which the court must make an order which must necessarily appear of record, and such order does not appear of record, then the presumption in favor of the jurisdiction cannot be claimed. In the one case the unrequired proof of service was absent; in the other the prerequisite authority for service.⁶²

of an absent party, not a citizen of the state nor found within it, a strict and literal compliance with the statutory provisions is necessary.

4. In proceedings had under special statutory authority, where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

Extract from syllabus in *Applegate v. Lexington etc. Min. Co.*:

Where a court of general jurisdiction is authorized to bring in, by substituted service, nonresident defendants interested in property

within its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid.

⁶² The two leading cases and the law of the point generally were well discussed by Wolverton, J., in *Cohen v. Portland Lodge No. 142, B. P. O. E.*, 144 Fed. 266, where the learned judge thus expressed himself: The judgment or decree of a superior court intrusted with general jurisdiction, acting within the scope of its ordinary powers and in pursuance of the course of the common law, is aided by an attendant presumption that jurisdiction was regularly acquired, as to both the subject matter and the person, until the contrary appears. The presumption supplies any omission,

§ 33b (28). **Same—Ministerial powers.**—The limitation of the rule when the action in the court is ministerial is now, by the light of well-considered decisions, almost self-evident. It has occurred that the exigency for the exercise of some special power has faced the legislature, and in lieu of appointing an officer to carry out the will of the governing body, they have adopted the expedient of intrusting its exercise to some court already constituted. At the end of the Civil War, several cases arose under an act of the commonwealth of Virginia, passed the 9th of March, 1862, authorizing the county courts to purchase and distribute salt amongst the people and provide payment for the same. It will thus be seen that a jurisdiction entirely nonlegal was being exercised by the courts, and Christian, J., in one of such cases laid down what may now be regarded as general legal propositions of universal application governing the presumption of jurisdiction:

where the record is silent as to the essential steps required to be taken or observed as a prerequisite to the acquirement of jurisdiction. Where, however, the record speaks respecting facts or conditions upon which jurisdiction has been assumed, it will import verity, and nothing different or to the contrary will be presumed in aid of the consequent adjudication. If it were otherwise, collateral attack would be unknown to the law, as the presumption would not only supply all omissions, but would also transform a bad and utterly insufficient record into a good and ample one, supporting the judgment or decree in every prescribed essential. The presumption is not to be indulged where the court is possessed of special and limited powers only, unless it may be in so far as it proceeds according to the course of the common law in the acquirement of jurisdiction over the person of the *res*; nor is it to be indulged where the process prescribed for the acquirement of

jurisdiction is special, and not according to the course of common law, as where constructive service of summons is authorized to be made upon persons not within the territorial jurisdiction of the court. In all such cases the essential statutory prerequisites should appear to have been observed under what is usually termed a "strict construction," because in derogation of the common law: 17 Am. & Eng. Ency. of Law, 2d ed., pp. 1073-1080; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959; *Odell v. Campbell*, 9 Or. 298; *Northcut v. Lemery*, 8 Or. 316. But this rule requires nothing to be incorporated in the record that the statute does not so require, and, if omissions appear with reference to the entry of such prerequisites to jurisdiction, the presumption will even then supply the deficiency: *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742. See, also, *Gregory v. Bartlett*, 55 Ark. 36, 17 S. W. 345.

"When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, that is, according to the course of the common law and of proceedings in chancery, such judgment cannot be impeached collaterally. But when a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial,—in such cases its decision must be regarded and treated like those of courts of limited and special jurisdiction and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."⁶³

§ 34 (29). Regularity of proceedings subsequent to gaining jurisdiction.—It must not be assumed that the presumption applies only to the fact of jurisdiction. It is common knowledge that the proportion which jurisdic-

⁶³ *Pulaski Co. v. Stuart*, 28 Gratt. (Va.) 872; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119, 5 L. Ed. 221; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Shivers v. Wilson*, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; *Foster v. Glazener*, 27 Ala. 391; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Ludlow v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609; *Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 325; *Brown v. Wheelock*, 75 Tex. 385, 7 S. W. 111, 841. The fact that judgments are entered on warrant of attorney does not render the proceeding of this statutory character: *Bush v. Hanson*, 70 Ill. 480. In *Harvey v. Tyler*, 2 Wall. (U. S.) 328, 342, 17 L. Ed. 871, the supreme court of the United States uses the following language: "The jurisdiction which is now exercised by the common-law courts in this

country is, in a very large proportion, dependent upon special statutes conferring it. . . . In all cases where the new powers thus conferred are to be brought into action in the usual form of common law and chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case."

tion bears to the rest of the cause, while paramount in importance, is that of one of several elements going to make up the record. The presumption not only applies to the fact of jurisdiction, but to the regularity of proceedings subsequent to the gaining of jurisdiction. When the jurisdiction of a competent court has attached, every act is presumed to have been rightly done until the contrary appears. This applies not only to the final decree but to every judgment or order rendered in the various stages of the proceeding.⁶⁴ The reasons on account of

⁶⁴ *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760; *Jackson v. Astor*, 1 Pinn. (Wis.) 137, 39 Am. Dec. 289; *Slicer v. Bank of Pittsburg*, 16 How. (U. S.) 571, 14 L. Ed. 1063; *Blair v. Railway Co.*, 89 Mo. 383, 1 S. W. 350. If bill of exceptions does not contain all the evidence, it will be presumed that the evidence was sufficient to support the judgment: *Wagers v. Dickey*, 17 Ohio, 439, 49 Am. Dec. 467; *Wood v. Lakeshore Ry. Co.*, 49 Mich. 370, 13 N. W. 779; *Butler v. Winona Mill Co.*, 28 Minn. 205, 41 Am. Rep. 277, 9 N. W. 697; *Belkin v. Rhodes*, 76 Mo. 643; *Fife v. Commonwealth*, 29 Pa. 429; *Abbott v. Johnson*, 47 Wis. 239, 2 N. W. 332; *United States v. White*, 5 Cranch C. C. 73, Fed. Cas. No. 16,676; *Credit Foncier v. Rogers*, 10 Neb. 184, 4 N. W. 1012. Unless record shows otherwise, it will be presumed that improper evidence was not admitted: *Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607; *Sutton v. Reagan*, 5 Blackf. (Ind.) 217, 33 Am. Dec. 466; *Boston v. Lewis*, 3 Ariz. 5, 20 Pac. 310; or if admitted was disregarded: *Ritter v. Schenk*, 101 Ill. 387; that every fact susceptible of proof was proved: *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216; that the charge of the court was correct: *Sims v. State*, 68 Ga. 486; *Lackey v. Bostwick*, 54 Ga. 45; that the

jury followed the instructions of the court: *Abbott v. M. L. H. & T. Co.*, 126 Wis. 634, 4 L. R. A., N. S., 202, 106 N. W. 523; that where the law required instructions to be in writing, that instruction was refused because not in writing: *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744; that the grand jury was duly subpoenaed: *Long v. State*, 46 Ind. 582; that the trial jury were duly sworn (*Osgood v. State*, 64 Wis. 472, 25 N. W. 529), and in charge of a sworn officer (*State v. Pitts*, 11 Iowa, 343), duly admonished by the judge (*State v. Shelledy*, 8 Iowa, 477), and that they possessed sufficient intelligence to understand the judge: *Hart v. Newton*, 48 Mich. 401, 12 N. W. 508; that the prisoner was present in court during all proceedings: *People v. Stuart*, 4 Cal. 218 (but in *French v. State*, 85 Wis. 400, 39 Am. St. Rep. 855, 21 L. R. A. 402, 55 N. W. 566, a conviction of murder was not sustained where neither the minutes of the clerk nor the record showed that the prisoner was present in court when the verdict of guilty was rendered or that he was present when sentence was pronounced against him; but in *Hoffman v. State*, 88 Wis. 166, 59 N. W. 588, such defective record was allowed to be amended upon testimony of the clerk and the sheriff); that the bill of exceptions is cor-

which the courts indulge such presumptions as are enumerated in the notes are thus stated in a Pennsylvania case: "We are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the judges and contain a general, but not particular, detail of all that occurs before them. If we should insist upon finding every fact fully recorded which must occur before a citizen could be punished for an offense against the laws, we should destroy public justice and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult

rect: *Eastman v. People*, 93 Ill. 112; that the judgment was regular: *Falkner v. Christian*, 51 Ala. 495; *Bunker v. Rand*, 19 Wis. 253, 88 Am. Dec. 684. After verdict all presumptions are in its favor: *Gentry v. McKehen*, 5 Dana (Ky.), 34; *Christ v. People*, 3 Colo. 394. After judgment it will be presumed that *summons was duly served*: *Ray v. Rowley*, 1 Hun (N. Y.), 614; that proper steps were taken to secure discharge in bankruptcy: *Young v. Ridenbough*, 3 Dill. (U. S.) 239, Fed. Cas. No. 18,173; *Salters v. Tobias*, 3 Paige Ch. (N. Y.) 338; that writ properly returned was duly served: *Drake v. Duvenick*, 45 Cal. 455; that *necessary parties* were before the court: *Jones v. Edwards*, 78 Ky. 6; that all persons interested had *due notice*: *Brown v. Wood*, 17 Mass. 68; *Gibson v. Foster*, 2 La. Ann. 509; that where several acts in a judicial proceeding are performed on the same day, they were performed *in proper order* to give them legal effect: *Knowlton v. Culver*, 2 Pinn. (Wis.) 243, 52 Am. Dec. 156, 12 Morr. Min. Rep. 682; *Metts v. Bright*, 4 Dev. & B. (N. C.) 311, 32 Am. Dec. 683; that names of witnesses were duly published in naturalization proceedings: *United States v. Erickson*, 188 Fed. 747; that defects in jurat were sup-

plied by evidence: *Reclamation District v. Snowball*, 160 Cal. 695, 117 Pac. 905, 118 Pac. 514; that the court had proper evidence for making an order: *Commonwealth v. Bolkom*, 3 Pick. (Mass.) 281; *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *State v. Lewis*, 22 N. J. L. 564. The *prima facie* presumption that an affidavit is sworn to in the county named in its caption or venue is overcome by the presumption that an officer's acts are performed at the county where he is legally authorized to act: *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113 N. W. 1036. The presumption applies where records and documentary evidence are lost and proof by secondary evidence is made: *In re Warfield*, 22 Cal. 51, 83 Am. Dec. 49; *Carroll v. Peake*, 1 Pet. (U. S.) 18, 7 L. Ed. 34. It has been held that the presumption applies only between parties to the proceeding: *Seechrist v. Baskin*, 7 Watts & S. (Pa.) 403, 42 Am. Dec. 251. Courts will presume that parties are *sui juris*, without disability, till the contrary appears: *Gunter v. Hinson*, 161 Ala. 536, 50 South. 86. Where an application to be appointed administrator was lodged before the resignation of the public administrator was accepted, but such application was not granted

to do things correctly than to describe them correctly.”⁶⁵ It is equally common knowledge that all requisitions of the law are conditions precedent to a right claimed, and that they must be performed before the power of a court can be successfully invoked. But the provisions of the law do not always prescribe what shall be deemed evidence that such acts have been done, nor do they always direct that their performance shall appear on the record. The United States supreme court in an old but important suit dealing with land sold under foreign attachment laws, where certain irregularities in the sale under judicial process were relied upon,⁶⁶ said: “This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the single question, whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction; to which was added, by the act of 1805, power to issue writs of attachments, and order a sale of the property attached on certain conditions. No objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale which was executed and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity

until after acceptance and discharge of the public administrator, the court said: “If it is necessary, under section 1427, that the estate be delivered up by the first administrator before a second can be appointed, it must be presumed, on the record before us, that such de-

livery was made”: *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127; *Barboza v. Pacific etc. Co.* (Cal.), 120 Pac. 767.

⁶⁵ *Beale v. Commonwealth*, 25 Pa. 11.

⁶⁶ *Voorhees v. Jackson*, 10 Pet. (U. S.) 449, 9 L. Ed. 490, 499.

in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged.”⁶⁷ Jurisdiction

⁶⁷ The case of *Voorhees v. Jackson*, *supra*, is good law. So late as July, 1910, we find it referred to in *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462, 472. Mr. Justice Swayne, in *McNitt v. Turner*, 16 Wall. (83 U. S.) 353, 21 L. Ed. 341, after discussing the points involved in the case, which related to a proceeding by an administrator in the state of Illinois to sell lands of a decedent for assets, and deciding that although there were irregularities the court which ordered the sale had jurisdiction, and laying down the rule which we have before referred to, that when jurisdiction has attached, whatever errors may subsequently occur in its exercise cannot be impeached collaterally save for fraud, proceeds further to say that the order of sale before the court was within the rule, and then quotes from *Grignon's Lessee v. Astor et al.*, 2 How. (U. S.) 341, 11 L. Ed. 283, the following: "The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of its jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and deter-

mine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law. This case and the case of *Voorhees v. Bank of the United States*, 10 Pet. (U. S.) 449, 9 L. Ed. 490, are the leading authorities in this court upon the subject. Other and later cases have followed and been controlled by them. *Stow v. Kimball*, 28 Ill. 93, affirms the same doctrine." And again in *Davis v. Gaines*, 104 U. S. 386, 26 L. Ed. 757, the law as laid down in *Thompson v. Tolmie*, 2 Pet. (27 U. S.) 156, 7 L. Ed. 381, is reiterated in the following language: "The law appears to be settled in the states that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of the orphans' courts. When there has been a fair sale the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings." And the court goes further in the case of *Davis v. Gaines* to say that: "It is sufficient for the buyer to know that the court had jurisdiction and exercised it,

is authority to hear and determine. It is an axiomatic proposition that, when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice* can be impeached collaterally only for fraud.⁶⁸

§ 35. Same—Federal courts.—It was settled by the United States supreme court at a very early date that, although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet they were not nullities, and would bind the parties until reversed or otherwise set aside.⁶⁹ In a well-known case,⁷⁰ the circuit court had taken jurisdiction of a suit and rendered a decree, and the decree was reversed by the United States supreme court on appeal, and the cause remanded with directions to proceed in a particular way. When the case got back it was discovered that the cause was “not within the jurisdiction of the court,” and the judges of the circuit court certified to the supreme court that they were opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted upon it. To that question the following answer was certified back: “It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings.” That was in 1810. In 1825 it was followed by an opinion of Mr. Justice Washington, who, after referring to the previous decisions, laid down what has been accepted as the sound principle to be applied. He

and that the order on the face of which the purchase was made authorized the sale.”

⁶⁸ McNitt v. Turner, *supra*.

⁶⁹ Des Moines Nav. & R. R. Co.

v. Iowa Homestead Co., 123 U. S. 557, 31 L. Ed. 204, 8 Sup. Ct. Rep. 217.

⁷⁰ Skillern v. May, 10 U. S. (6 Cranch), 267, 3 L. Ed. 220.

said:⁷¹ "The district and circuit courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction does not appear upon the proceedings, their judgments and decrees will be reversed on error or appeal. But they are not nullities which may be disregarded in a collateral proceeding. In this respect the district and circuit courts of the United States stand on the same footing as courts of general jurisdiction; and the authority of such courts is always presumed, until the contrary is shown."⁷² It will thus be seen that the same presumptions which are indulged in favor of courts of general jurisdiction of the several states exist with the same vigor in the federal courts. Limited as is the jurisdiction of the inferior *nisi prius* courts of the United States, and subject to a presumption against jurisdiction throughout the progress of a cause, yet the judgments of these tribunals are not nullities, although jurisdiction is not shown upon the record. Such judgments are, although jurisdiction is not apparent, binding upon the parties, and the presumption of their validity is as sound in the federal as we have shown it to be in the state courts.⁷³

⁷¹ McCormick v. Sullivan, 10 Wheat. (U. S.) 192, 6 L. Ed. 300, 302.

⁷² Ruckman v. Cowell, 1 N. Y. 505, 507; Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Thoms v. Southard, 2 Dana (Ky.), 475, 27 Am. Dec. 467; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Turrell v. Warren, 25 Minn. 9; Pierro v. St. Paul Ry. Co., 37 Minn. 314, 34 N. W. 38.

⁷³ From vol. 2 of Notes on U. S. Reports, pp. 408, 409, we extract the following: Numerous cases have affirmed this doctrine, applying it as follows, considering first supreme court citations: Bank v. Moss, 6 How. (U. S.) 40, 12 L. Ed. 334, holding final judgment by circuit court could only be disturbed for want of

jurisdiction by the supreme court; Erwin v. Lowry, 7 How. (U. S.) 180, 12 L. Ed. 658, holding that final judgment of federal court could not be attacked collaterally in state court, for want of jurisdiction; Kennedy v. Bank, 8 How. (U. S.) 611, 12 L. Ed. 1219, holding that though proceedings were erroneous for want of allegation of citizenship of parties, they were not for that reason void; Des Moines Co. v. Homestead Co., 123 U. S. 557, 8 Sup. Ct. Rep. 220, 31 L. Ed. 204, holding not void an unreversed judgment of federal court where jurisdiction did not appear; Cuddy, Petitioner, 131 U. S. 284, 33 L. Ed. 156, 9 Sup. Ct. Rep. 704, holding that jurisdiction of court in contempt proceedings could not be assailed collaterally on application for

§ 36 (31). The rule as to inferior courts.—The inferior courts of special and limited jurisdiction do not share to the like extent as the superior courts the presumption in favor of jurisdiction. In the old leading case of *Peacock v. Bell*,⁷⁴ dating from the seventeenth year of the reign of Charles II, the haphazard King of England, whose reign is

writ of *habeas corpus*; In re Cooper, 143 U. S. 506, 36 L. Ed. 243, 12 Sup. Ct. Rep. 462, holding decree of district court in admiralty could not be attacked collaterally on application for writ of prohibition; Evers v. Watson, 156 U. S. 533, 39 L. Ed. 523, 15 Sup. Ct. Rep. 432, where held decree of circuit court could not be attacked in collateral proceedings in same court for want of jurisdiction; Dowell v. Applegate, 152 U. S. 339, 38 L. Ed. 467, 14 Sup. Ct. Rep. 616, holding unreversed decree of circuit court binding upon parties, and could not be treated as a nullity by state court because jurisdiction had not appeared; Cutler v. Huston, 158 U. S. 430, 39 L. Ed. 1042, 15 Sup. Ct. Rep. 871, holding judgment of circuit court could not be treated as void in collateral proceeding on ground that diverse citizenship of parties had not appeared; In re Lennon, 166 U. S. 553, 41 L. Ed. 1112, 17 Sup. Ct. Rep. 660, where diverse citizenship of plaintiff and defendants appeared on the record in circuit court, contrary not permitted to be shown and judgment assailed therefor on petition for *habeas corpus*. To which may be added *Chesapeake & Ohio R. R. Co. v. McCabe*, 213 U. S. 207, 53 L. Ed. 765, 29 Sup. Ct. Rep. 430. In the inferior federal courts the following cases rely on the same rule: *Brown v. Noyes*, 2 Wood. & M. 75, Fed. Cas. No. 2023; *Speigle v. Meredith*, 4 Biss. 127, Fed. Cas. No. 13,227; *The Fideliter*, 1 Saw. 156, 1 Abb. (U. S.) 579, Fed. Cas.

No. 4755; *Farmers' etc. Co. v. McKinney*, 6 McLean, 10, Fed. Cas. No. 4667; *Holmes v. Railroad Co.*, 7 Saw. 392, 9 Fed. 237; In re Eaton, 51 Fed. 805; *Skirving v. Insurance Co.*, 59 Fed. 745, 8 C. C. A. 241, 19 U. S. App. 442; *Foltz v. Railway Co.*, 60 Fed. 318, 8 C. C. A. 635, 19 U. S. App. 576; *Ex parte Lennon*, 64 Fed. 322, 12 C. C. A. 134, 22 U. S. App. 561; *Pullman Co. v. Washburn*, 66 Fed. 794; *Board v. Platt*, 79 Fed. 571, 25 C. C. A. 87, 49 U. S. App. 216, 222; *Dexter Co. v. Sayward*, 84 Fed. 303; *Ludington v. The Nucleus*, 15 Fed. Cas. 1095, Fed. Cas. No. 8598; In re McDonald, 16 Fed. Cas. 28, Fed. Cas. No. 8751. To which may be added *Illinois Cent. R. Co. v. Sheegog*, 177 Fed. 756; *Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 89 C. C. A. 642.

⁷⁴ *Peacock v. Bell*, 1 Saund. 73, 85 Eng. Reprint, 88; *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488. Courts of justice of the peace are clearly inferior courts: *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Levy v. Shurman*, 6 Ark. 182, 42 Am. Dec. 690; *Jones v. Hunt*, 90 Wis. 199, 63 N. W. 81; *King v. Inhabitants of All Saints*, 7 Barn. & C. 785, 108 Eng. Reprint, 916; although the contrary is held in a few states: *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760; *Wright v. Hazen*, 24 Vt. 143; *Turner v. Ireland*, 11 Humph. (Tenn.) 447; *Stevens v. Mangum*, 27 Miss. 481.

sponsor for so much good law, we find the law truly and tersely expressed: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." In 1821 we find this language paraphrased thus: "There is, however, a marked and decided distinction between superior courts of general jurisdiction, and inferior courts, or courts of special and limited jurisdiction. In the former case, the intendment of the law is, that they had jurisdiction, until the contrary appears; but with regard to inferior courts, or those of special or limited jurisdiction, those who claim any right or exemption under their proceedings are bound to show, affirmatively, that they had jurisdiction."⁷⁵ By this it is meant that it must appear on the face of the proceedings of such courts that they have acted within the scope of their authority; and that the minutes or record must af-

⁷⁵ *Mills v. Martin*, 19 Johns. (N. Y.) 33. See *Wright v. Watson*, 11 Humph. (Tenn.) 529; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81. The land against which a vendor's lien is sought to be enforced is presumed to be within the territorial jurisdiction of the court rendering a decree enforcing the lien, where the record does not show the location of the land: *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625; *Howard v. Gosset*, 10 Q. B. 359, 59 E. C. L. 359, 116 Eng. Reprint, 139; *London v. Cox*, L. R. 2 H. L. 239; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959; *Gray v. Larrimore*, 4 Saw. 638, 2 Abb. (U. S.) 542, 10 Fed. Cas. No. 5721; *Chamblee v. Cole*, 128 Ala. 649, 30 South. 630; *McClure v. Hill*, 36 Ark. 268; *Raymond v. Bell*, 18 Conn. 81; *Von Kettler v. Johnson*, 57 Ill. 109; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Kenney v. Greer*, 13 Ill. 432,

54 Am. Dec. 439; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Green v. Haskell*, 24 Me. 180; *Clark v. Bryan*, 16 Md. 171; *Truesdale v. Hazzard*, 2 Mich. 344; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49; *Rohland v. St. Louis & S. F. R. Co.*, 89 Mo. 180, 1 S. W. 147; *McCloon v. Beattie*, 46 Mo. 391; *Kuker v. Beindorff*, 63 Neb. 91, 88 N. W. 190; *Tebbetts v. Tilton*, 31 N. H. 273; *Graham v. Whitely*, 26 N. J. L. 254; *In re Baker*, 173 N. Y. 249, 65 N. E. 1100; *Chemung Canal Bk. v. Judson*, 8 N. Y. 254; *People v. Koeber*, 7 Hill (N. Y.), 39; *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504; *Fowler v. Jenkins*, 28 Pa. 76; *Hopper v. Fisher*, 2 Head (Tenn.), 253; *Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758; *Mayer v. Adams*, 27 W. Va. 244.

firmatively show the existence of all facts necessary to jurisdiction.⁷⁶ It does not necessarily follow, however, that the judgment is absolutely void if the matters necessary to jurisdiction do not appear. In such case, although there is no presumption in favor of jurisdiction, it has been held admissible to show the necessary facts by extraneous evidence.⁷⁷ A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon, or claiming any right under, its judgments. Where it nowhere appeared in the justice's docket or other papers, in an action determined in a justice's court, that the defendant against whom judgment by default was rendered resided in the township in which the action was commenced, or that he was within any of the exceptions enumerated in the Practice Act of California, it was held that when the proceedings and judgment in said action, as contained in said docket and other papers alone, were offered in evidence against the defendant in another action, they were properly rejected, because jurisdiction of the person of the defendant did not affirmatively appear. The fact of the residence of defendant in a particular township is jurisdictional, but the Practice Act did not require its existence to be recorded in the justice's docket, or be made to appear in any written evidence of the proceedings in the action, nor did it provide in what manner such facts as are not required to be entered in the docket or other written proceeding shall be made to appear, or be proved; and, further, that in such case, it was error for the court to reject parol evidence that such defendant, at the time said action was commenced, resided in the township where it was commenced. Where there was, in fact, no written evidence upon the question of residence of the defendant, in

⁷⁶ *Kempe v. Kennedy*, 5 Cranch (U. S.), 173, 3 L. Ed. 70; *Hall v. Howd*, 10 Conn. 514, 27 Am. Dec. 696; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Adams v. Tiernan*, 5 Dana

(Ky.), 394; *Rutherford v. Crawford*, 53 Ga. 138. See § 613, *post*.

⁷⁷ *Jolley v. Foltz*, 34 Cal. 321; *Van Deusen v. Sweet*, 51 N. Y. 381. But such proof is not allowed as to facts which the statutes expressly require to be recorded: See cases last cited.

a judgment rendered in a justice's court, and no entry in writing upon the subject is, by law, required to be made, parol evidence was admissible on the subject, to sustain such judgment. Such proffered evidence in no respect contradicted the docket, but, on the contrary, was entirely consistent with it, and supported the judgment. The rule seems to be, that those jurisdictional facts in support of judgments in justices' courts which are not in writing, or required to be in writing, or in fact entered in the docket, may be proved by parol; but the rule is otherwise where the statute requires such facts to be entered in the docket and they are so entered, or where they actually appear in the written files of the action, because parol evidence in such cases is not the best evidence, and such entries and writings may not be contradicted by parol evidence.⁷⁸ The rule that no presumptions are indulged in favor of the proceedings of inferior courts only applies to the question of jurisdiction; and such courts, like others, are presumed to have acted correctly as to matters within such jurisdiction.⁷⁹

§ 37 (32). Same — Courts of probate.—The rule has sometimes been declared that the probate or county courts of this country as generally created are not courts of general jurisdiction within the meaning of the rule, and that no intendments can be made in favor of their jurisdiction beyond what appears on the face of the proceedings.⁸⁰

⁷⁸ *Jolley v. Foltz, supra.*

⁷⁹ *McGrews v. McGrews*, 1 Stew. & P. (Ala.) 30; *Bacon v. Bassett*, 19 Wis. 45; *Slicer v. Bank of Pittsburgh*, 16 How. (U. S.) 571, 14 L. Ed. 1063. The strictness with which the proceedings of inferior tribunals are scrutinized applies only to the question of jurisdiction, and when that is established, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction: *State v. Hinchman*, 27 Pa. 479.

⁸⁰ *Taliferro v. Basset*, 3 Ala. 670; *Sims v. Waters*, 65 Ala. 442; *Fairfield v. Gullifer*, 49 Me. 360, 77 Am.

Dec. 265; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653; *Sullivan v. Blackwell*, 28 Miss. 737; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Strouse v. Drennan*, 41 Mo. 289; *Bloom v. Burdick*, 1 Hill (N. Y.), 130, 37 Am. Dec. 299; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Forster's Estate*, 2 Lane. L. Rev. 206; *Easley v. McClinton*, 33 Tex. 288. In *Taber v. Douglass, supra*, the court said that in *Snow v. Russell*, 93 Me. 362, 74 Am. St. Rep. 350, 45 Atl. 305, it was held that a decree of the judge of probate licensing the sale of real estate in

But while it is true that such courts are courts of limited jurisdiction, yet they very generally have general jurisdiction over the administration of estates. They are courts of record, having very extensive powers; and a fair regard for the security of property rights demands that the same presumptions should be extended in favor of their acts as to those of other courts of record. In the opinion of the author, this view is sustained by the weight of authority.⁸¹ That weight of authority is so persuasive that it may be accepted at this date that probate courts do not come within the category of inferior courts, and that the regularity of their proceedings is beyond question. Undoubtedly they were not so considered in the earlier days, and the cases cited, especially those from Maine, bear this out, some of them in a qualified way. The trend of the last quarter of a century is to render them the dignity and consequence of a superior court. The utterances of some of the states are of no uncertain sound.

that case by an executor for the purpose of paying debts, and excusing the executor from giving bonds before making the sale, is void; that the sale under such license, no bond in fact having been given, is equally void; and that the validity of the decree and the sale may be attacked collaterally though no appeal was taken from the decree. As to the effect of such judgments, see § 609, *post*.

⁸¹ *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Shroyer v. Richmond*, 16 Ohio St. 455; *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555; *Fletcher v. Sanders*, 7 Dana (Ky.), 345, 32 Am. Dec. 96; *Irwin v. Scriber*, 18 Cal. 499; *Wyatt v. Steele*, 26 Ala. 639; *Redmond v. Anderson*, 18 Ark. 449; *Brien v. Hart*, 6 Humph. (Tenn.) 131; *People v. Cole*, 84 Ill. 327; *McKellar v. McKay*, 156 N. C. 283, 72 S. E. 375; *Brooks v. Walker*, 3 La. Ann. 150

(letters of administration presumptive evidence that requisite oath was taken); *Den v. Gaston*, 25 N. J. L. 615 (letters of administration regular on face presumed legally issued); *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488 (administrator's bond presumed to have been given in open court in certain cases). See, also, *Musselman's Appeal*, 65 Pa. 485. For want of jurisdiction over homestead where heirs claim, see *Mercier v. Chace*, 9 Allen (Mass.), 242; and for clear exposition by Shaw, C. J., see *Peters v. Peters*, 8 Cush. (Mass.) 529. But where the records are apparently entire and no loss of papers is suggested, it cannot be presumed that a final judgment has been made which does not appear: *Hathaway v. Clark*, 5 Pick. (Mass.) 490; *Picot v. Bates*, 39 Mo. 292. Nor can it be presumed that an administrator's sale has been confirmed: *Walker v. Jessup*, 43 Ark. 163.

In Arkansas we find, "The probate court being a court of superior jurisdiction, and its record being silent as to notice of the application, the presumption is, that it was duly given."⁸² In Colorado, "A settlement made under said statute is a final account, regularly made, and constitutes a judgment conclusive between the ward on one side and the guardian and surety on the other, unless impeached in the court in which it was rendered by proof of fraud or such other defects as would invalidate judgments of other courts. . . . Such judgment was admitted in evidence without objection. Under these circumstances it is presumed that the county court acted correctly and with due authority, and its judgment, so far as this controversy is concerned, is valid and conclusive."⁸³ In Idaho, "Where the record of the probate court fails to show what disposition was made of a demurrer and motion filed, and it does not otherwise appear what disposition was made of the same, but the record does show that a default was entered against the defendant for want of an answer, the court will presume on appeal from such judgment that the demurrer and motion were overruled, and that the defendant was in default."⁸⁴ In Illinois, "The probate court of Cook county has general jurisdiction of the settlement of the estates of deceased persons, and, when adjudicating upon questions arising in such matters, as liberal intendments are to be made in favor of its findings as of those of courts of general jurisdiction."⁸⁵ In Kentucky, "The county court did not intend to grant administration as in case of intestacy; for he at the time admitted the will to probate. When he had probated the will, and there was no executor, he had jurisdiction to grant administration as in case of intestacy; for he at the time admitted the

⁸² Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Clay v. Bilby, 72 Ark. 101, 1 Ann. Cas. 917, 78 S. W. 749; McConnell v. Day, 61 Ark. 474, 33 S. W. 731; McLain v. Duncan, 57 Ark. 53, 20 S. W. 597; Marks v. Matthews, 50 Ark. 338, 7 S. W. 303; Boyd v. Roane, 49 Ark. 397, 5 S. W.

704; Borden v. State, 11 Ark. 519, 44 Am. Dec. 217.

⁸³ American Bonding Co. v. People, 46 Colo. 394, 104 Pac. 81.

⁸⁴ Smith v. Clyne, 16 Idaho, 466, 101 Pac. 819.

⁸⁵ Balsewicz v. Chicago, B. & Q. Ry. Co., 240 Ill. 238, 88 N. E. 734.

will to probate. When he had probated the will, and there was no executor, he had jurisdiction to grant administration with the will annexed. The presumption is, he did his duty and acted within his jurisdiction. . . . The omission of those things which are silently expressed is of no consequence."⁸⁶ In Missouri, "The agency of the affiant in the present case may have been orally proved in the probate court, and the circuit court could presume this was done unless the contrary was proved."⁸⁷ In New York, "The probate decree is presumptive evidence of the facts as to proper execution, as to the competency of the testator and that he was not under restraint."⁸⁸ In Oregon, "It is well settled in this state that county courts, when exercising the power of ordering the sale of the real property of a decedent to pay debts, are to be deemed courts of general and superior jurisdiction. The judgments and orders of such courts cannot therefore be collaterally impeached, except where the want of jurisdiction affirmatively appears on the face of the record."⁸⁹ In Washington, "In so far as probate courts have general jurisdiction their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depended, and the rule applies even though the court is one of limited jurisdiction where it is vested with full authority over probate and testamentary matters and is a court of record."⁹⁰ The student desiring further references may profitably consult the cases and works referred to at foot.⁹¹

⁸⁶ *Young v. Chesapeake & O. Ry. Co.*, 136 Ky. 784, 125 S. W. 241.

⁸⁷ *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049; *Strobel v. Clark*, 128 Mo. App. 48, 106 S. W. 585; *Wood v. Flanery*, 89 Mo. App. 632; *Million v. Ohnsorg*, 10 Mo. App. 432; *Merchants' etc. Co. v. Linchey*, 3 Mo. App. 588; *Kincheloe v. Gorman*, 29 Mo. 421.

⁸⁸ *Drake v. Cunningham*, 127 App. Div. 79, 111 N. Y. Supp. 199.

⁸⁹ *Smith v. Whiting*, 55 Or. 393, 106 Pac. 791; *Slate's Estate*, 40 Or.

350, 68 Pac. 399; *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322; *Tustin v. Gaunt*, 4 Or. 305; *Russell v. Lewis*, 3 Or. 389.

⁹⁰ *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16.

⁹¹ *Steele v. Tutwiler*, 68 Ala. 107; *Redmond v. Anderson*, 18 Ark. 449; *Wood v. Crawford*, 18 Ga. 526; *Bush v. Lindsey*, 24 Ga. 245, 71 Am. Dec. 117; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Ford v. Ford*, 117 Ill. App. 502; *Goss v. R. Co.*, 137 Ky. 398, 125 S. W. 1061; *In re Watt's*

§ 37a (32). Same—Force of presumption increased by lapse of time.—The doctrine of presumption, arising from lapse of time, has frequently and properly been pressed as sufficient to overcome whatever may seem to have been omitted by an administrator in the discharge of his duty; and it is entitled to great force, sufficient, as has been said, to obviate most of the objections raised. Apart from its general application, special weight attaches to the presumption of regularity in such proceedings after great lapse of time; and after many years the presumption has sometimes been held conclusive. In Mississippi we find Sharkey, C. J., thus expressing himself: “We know that the legislation was imperfect in character, and limited to the wants of the few inhabitants that then occupied the territory, and we know also that even until within a late period, judicial proceedings and especially those of the probate courts, were conducted with but little regard to exactness. The judges of probate were probably not generally lawyers. They acted without any uniform system fixed by construction of the statutes from which their powers were derived. Under the circumstances, we could not expect the utmost regularity in their proceedings. Even at the present day, under the same statutes which then existed, we find many defects in the judgments and proceedings of the probate courts. We must therefore make the greatest allowance, after the great lapse of time, for apparent omissions and discrepancies.”⁹²

§ 38 (33). Same — As to judgments in other states.—There is a legal presumption in the absence of contradictory

Estate, 108 Md. 696, 71 Atl. 316 (orphan's court); *State v. Nolan*, 99 Mo. 569, 12 S. W. 1047; *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Hess v. Cole*, 23 N. J. L. 116; *Mattson v. Swenson*, 5 S. D. 191, 58 N. W. 570; *Martin v. Robinson*, 67 Tex. 378, 3 S. W. 550; *Townsend v. Downer*, 32 Vt. 183; *Lethbridge v. Launder*, 13 Wyo. 9, 76 Pac. 682. See, also, “Courts,” 11 Cyc. of Law &

Procedure, pp. 694, 697, and cases there collected.

⁹² *Stevenson v. McReary*, 12 Smedes & M. (Miss.) 9, 51 Am. Dec. 102. See, also, *Sprague v. Litherberry*, 4 McLean (U. S.), 442, Fed. Cas. No. 13,251; *Austin v. Jordan*, 35 Ala. 642; *Seward v. Dedier*, 16 Neb. 58, 20 N. W. 12; *Wyatt v. Scott*, 33 Ala. 313; *Desverges v. Desverges*, 31 Ga. 753.

evidence, in favor of the jurisdiction of a court of record of another state, which has assumed to exercise jurisdiction over the subject matter in controversy between parties residing there. If the record produced shows on its face no want of jurisdiction, it will be presumed that the judgment was properly rendered, even though the facts upon which jurisdiction depended do not affirmatively appear. Thus, under an order of a court of record of another state, that certain property should be discharged from a mortgage thereon, upon the filing in court, within a specified time, of a bond, with sureties to be approved by the clerk, and with condition to pay the sum, if any, which should be found due upon the mortgage debt, a duly certified copy of the record of the court, showing that a bond was received and placed on file by the clerk and subsequent proceedings had which necessarily implied an approval and acceptance of the bond, is sufficient to prove the discharge of the property from the mortgage. The general rule on this subject is that, when a court of record—that is, a court having a judge, clerk and seal—has assumed to exercise jurisdiction over the subject matter of a controversy or proceeding, and has pronounced judgment therein, it will be presumed in all courts of other jurisdictions upon the production of a certified copy of the judgment authenticated as required by law, that the court had jurisdiction of the subject matter of the proceedings and authority to render the judgment.⁹³ So it will be presumed in favor of jurisdiction that intermediate proceedings, between the commencement of the action and the judgment, were regular in their character; and that the findings of the court in favor of its jurisdiction were correct. Thus, “where the transcript of a foreign judgment showed that the action had been instituted in one common-law court and by agreement of the attorneys for the par-

⁹³ *Buffum v. Stimpson*, 5 Allen (Mass.), 591, 81 Am. Dec. 767; *State v. Weber*, 96 Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490; *Stewart v. Stewart*, 27 W. Va. 167; *Lockhart v. Locke*, 42 Ark. 17; *Mills v. Stew-*

art, 12 Ala. 90; *Lincoln v. Tower*, 2 McLean (U. S.); 473, Fed. Cas. No. 8355; *Dodge v. Coffin*, 15 Kan. 277; *Davis v. Connelly's Exrs.*, 4 B. Mon. (Ky.) 136. See § 617, *post*.

ties transferred to another, 'waiving all possible objection to the jurisdiction to the latter court,' but no order for the transfer appeared in the transcript, and after several trials and continuances final judgment was rendered without the jurisdiction of the court to which the cause was transferred being called in question, it was held that the presumption was in favor of the jurisdiction, and if the court had no jurisdiction, it must arise from some provision of law which ought to have been shown."⁹⁴

§ 39 (34). Same—Collateral and direct proceedings.—The subject of the conclusive presumptions in favor of jurisdiction which arise from recitals in domestic judgments being confined to collateral proceedings will be

⁹⁴ Harper v. Nichol, 13 Tex. 151. "Everything upon the face of the transcript of the judgment shows that it was obtained in a different proceeding from any suit that is conducted according to the observances of our courts or the practice of the common law. And as the court was evidently one of superior or general jurisdiction, one that must be taken, in the absence of proof to the contrary, to have had jurisdiction of the subject matter of the suit, we must take it for granted, that it would not have proceeded to render judgment without first obtaining jurisdiction of the person of the debtor, the action appearing to be a personal action. . . . Comity, good sense and law require us to presume that its courts would not exercise jurisdiction over the person of a defendant, unless that jurisdiction was acquired by means known to its law": Nunn v. Sturges, 22 Ark. 389. See, also, Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Alaska Co. v. Debney, 2 Alaska, 303; Cummings v. O'Brien, 122 Cal. 204, 54 Pac. 742; In re Hancock's Estate, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; Glos v. San-

key, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628; Stull v. Veatch, 236 Ill. 207, 86 N. E. 227; Old Wayne Mut. L. Assn. v. Flynn, 31 Ind. App. 437, 68 N. E. 327; Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Dodge v. Coffin, 15 Kan. 277; Davis v. Connelly, 4 B. Mon. (Ky.) 136; Bank of United States v. Merchants' Bank, 7 Gill (Md.), 415; Van Norman v. Gordon, 172 Mass. 576, 70 Am. St. Rep. 304, 44 L. R. A. 840, 53 N. E. 267; State v. Weber, 96 Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490; Hanks v. Hanks, 218 Mo. 670, 117 S. W. 1101; Anthony v. Wilson, 74 N. J. L. 630, 65 Atl. 988; Johnston v. Ins. Co., 104 App. Div. 550, 93 N. Y. Supp. 1052; Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805; Coskery v. Wood, 52 S. C. 516, 30 S. E. 475; Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Christiansen v. Kriesel, 133 Wis. 508, 113 N. W. 980; Lincoln v. Tower, 2 McLean (U. S.), 473, Fed. Cas. No. 8355; Old Wayne Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236; Robertson v. Struth, 5 Ad. & E., N. S., 942, 114 Eng. Reprint, 1503.

found dealt with later on in this work.⁹⁵ In a direct proceeding, however, between the parties to the judgment, the presumption in favor of regularity may be rebutted, and it may be shown that the pretended record or judgment is in fact no record at all. The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and, consequently, that what purports to be a record is in fact no record at all. No consideration of public policy requires that one guilty of no negligence should be concluded by *ex parte* proceedings, of which he had no notice, because of a declaration made by the court, at the instance of his adversary, that he had such notice.⁹⁶ Thus it will be gathered in a direct proceeding to set aside a judgment, it may be shown that the alleged service was fraudulent or that no service was actually made.⁹⁷ The distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question collaterally, and those in which such record is directly impeached by writ of error or bill of review, is broad and

⁹⁵ See § 619, *post*.

⁹⁶ *Duncan v. Gerdine*, 59 Miss. 550. The opinion in this case of Cooper, J., from which the statement in the text is taken, continues: "If in fact Mrs. Duncan was not served with the process of the court, by what rule of law or reason shall she be required to submit to have her property sold for the satisfaction of that which is only the pretence of a judgment? It is not sufficient to reply that the court which rendered the judgment has adjudicated the fact that she was served with the summons, for if the summons was not served the court had no power to adjudicate that, or any other fact against her, and the whole fabric falls, unless she is forced, in the outset, to admit as

true that which she avers to be false, and that too when upon its truth depends her liability to its burden, and upon its falsity her right to relief. We reiterate what was said in *Sivley v. Summers* (57 Miss. 712), that in direct proceedings instituted for the purpose of testing the validity of the judgment, the truth must prevail, though the record falls. Relief may be sought through the interposition of the chancery court. *Freeman on Judgments*, § 495." See, also, § 619, *post*.

⁹⁷ *Newcomb v. Dewey*, 27 Iowa, 381; *McNeill v. Edie*, 24 Kan. 108; *Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466; *Chambers v. Bridge Manufacturing*, 16 Kan. 270; *Hanson v. Wolcott*, 19 Kan. 207.

well defined. In the one case, jurisdiction is presumed *prima facie*, unless the record disproves it, while in the other, if it is denied, its existence must be proved by the record itself.⁹⁸

§ 40 (34). Same — Awards of arbitrators.—The presumption of regularity extends to the proceedings of arbitrators. It will be presumed in support of their award that they have proceeded regularly and acted fairly and that they have received all the testimony which was offered; and every reasonable intendment will be made in favor of their award.⁹⁹ The courts will make no intendment for the purpose of overturning an award. On the contrary, it will be intended that arbitrators have decided all matters submitted to them, unless the contrary appears; and it is incumbent on the party who seeks to impeach an award, on the ground that it does not decide all the matters submitted, to show this.¹⁰⁰ In a very old case, but not

⁹⁸ Trimble v. Longworth, 13 Ohio St. 431. See, also, Blythe v. Hinckley, 84 Fed. 228.

⁹⁹ Browning v. Wheeler, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617; Bullitt v. Musgrave, 3 Gill (Md.), 31; Yates v. Russell, 17 Johns. (N. Y.) 461; Ackley v. Finch, 7 Cow. (N. Y.) 290; Lamphire v. Cowan, 39 Vt. 420; Hayes v. Forskoll, 31 Me. 112; Davies v. Pratt, 17 Com. B. 183; Strong v. Strong, 9 Cush. (Mass.) 560; Kendrick v. Tarbell, 26 Vt. 416; Wood v. Treleven, 74 Wis. 577, 43 N. W. 488; Brush v. Fisher, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446; McCord v. Flynn, 111 Wis. 78, 86 N. W. 668; Parsons v. Aldrich, 6 N. H. 264; Henrickson v. Reinback, 33 Ill. 299; Case v. Ferris, 2 Hill (N. Y.), 75; Robertson v. McNeil, 12 Wend. (N. Y.) 278; Chapin v. Boody, 25 N. H. 285; Joy v. Simpson, 2 N. H. 179; Dolph v. Clemens, 4 Wis. 181, as to presentment of claims; Robinson v. Hawkins, 38 Vt. 693, as to the tak-

ing and administering of a note. This presumption extends to the proceedings of commissioners of equalization of taxes; Foster v. Rowe, 128 Wis. 326, 107 N. W. 635.

¹⁰⁰ Tallman v. Tallman, 5 Cush. (Mass.) 325. The law doubtless is . . . that in order to make a valid award the arbitrators must pass upon all the material matters submitted to them. But the position which seems to be taken, that because the award fails to specify the particular finding on each item of an account it follows that the arbitrators did not pass upon them, is supported by neither reason nor authority. Every reasonable intendment is to be made in favor of an award of arbitrators: Strong v. Strong, 9 Cush. (Mass.) 560; Bush v. Davis, 34 Mich. 190. The legal presumption, unless the contrary appear, is that the arbitrators decide all matters which are submitted to them, and only those: 1 Amer. Law Reg., N. S., 691; Walker v. Merrill,

the less sound by reason of its age,¹ we find that where, by the agreement of the parties, a cause was referred to three referees, who, or any two of them, were to report, and two only did sign the report, which stated that the subscribers having heard the proofs and allegations of the parties made the findings as therein appeared, it will be presumed, on a writ of error brought on a judgment entered on the report, that all the referees met and heard the parties, though two only signed the report, nothing to the contrary appearing on the record.

§ 41 (35). Regularity of official acts.—For the convenience and expedition of human transactions, it was very early found prudent to extend the presumption of the regularity of official acts beyond those of judicial officers. There should exist no good reason for its limitation to judicial acts, because the rebuttal is at least no more difficult in the one case than the other. In the code states the presumption that official duty has been regularly performed is embodied as a rule in the list of disputable presumptions—presumptions satisfactory, if not contradicted.² Like other presumptions, the conclusion to establish it as a rebuttable rule was founded on the frequency

13 Me. 173; *Chapin v. Boody*, 25 N. H. 285; *Spear v. Hooper*, 22 Pick. (Mass.) 144; *Sides v. Brendlinger*, 14 Neb. 491, 17 N. W. 113, followed in *Johnson v. Johnson*, 87 Neb. 375, 127 N. W. 133, which says that in reviewing a judgment on an award of arbitrators, every presumption is in favor of the award and that arbitrators are not required to make their findings more certain than juries. See, also, *Travelers' Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 123 N. W. 643: "There is no proof offered that the arbitrator was guilty of any fraudulent or arbitrary action or fell into mistake in any other sense than that it is claimed he decided erroneously as to certain contentions urged by de-

fendant. But such a submission to arbitration as we have determined this to be confers just that jurisdiction to decide erroneously, if honestly, and to bind the parties to such determination by force of their agreement to be so bound." The submission involved a question of mixed law and fact, and the finding of arbitrator was held conclusive, not being attacked for any want of good faith. Such being the scope of the arbitrator, his province and jurisdiction were as broad as that of a court and his conclusion within that jurisdiction just as final upon the parties.

¹ *Yates v. Russell*, 17 Johns. (N. Y.) 461.

² See § 11b, *ante*.

with which acts of a like nature were performed by officers—the similarity of the proof required to support the allegation of regularity—the reiteration of the formula of having performed the act in the usual regular manner—until at length the common sense of the community called for a time-saving innovation which, in lieu of demanding the constant iteration of the precedent evidence, should presume the act to be regular until it was challenged. Naturally the presumption has less weight, and hence it is more easily rebutted when applied to acts in nonjudicial proceedings; but in each case the principle is the same, namely, that, when an official act is shown to have been substantially regular, it is presumed that the former requisites were also performed. Presumptions of this character are of constant application in a great variety of cases. Their weight varies greatly, depending on the length of time which has elapsed, the degree of the responsibility resting upon the officer, the extent to which he has been recognized as such by others, and the nature of the acts themselves; and in many cases these presumptions have no other effect than to determine the burden of proof.³

³ The variety of cases in which this presumption has been discussed is infinite. A few of the most pointed references are selected for illustration: *State v. Baptiste*, 105 La. 661, 30 South. 147 (the allegation that the venire list of three hundred names does not contain the name of a single colored man, although one-fourth of the population of the parish are negroes, while pregnant with the affirmation that the jury commissioners in making up the venire list discriminated against the negroes, yet is not a substantive allegation of that fact. However improbable it may be that the general venire list of three hundred names should not contain the name of at least one colored man if the jury commissioners had made their selection without discrimination, considering that one-

fourth of the population are negroes, yet such a thing is not impossible, and the presumption is that the jury commissioners did their duty); *Lyman County v. State*, 11 S. D. 391, 78 N. W. 17 (it will be presumed that the county officers properly performed their duties, and that all the claims allowed by the commissioners were carefully and honestly examined and audited in amounts believed to be legal and reasonable); *State v. Kempf*, 69 Wis. 470, 2 Am. St. Rep. 753, 34 N. W. 226 (the statute required the ballots to be preserved and disposed of in a particular manner by the proper officers, and, it must be presumed, even without averment, that those officers performed their duty); *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526 (where governor issues commissions for same office, on dif-

§ 42 (35). **Same.**—The presumption of the regularity of official acts has received, in addition to the statutory confirmation just referred to, the unqualified adoption of the great jurists. In a leading case, Mr. Justice Story thus states the principle and the grounds on which the presumption rests, and shows that it is not confined to official acts: "By the general rules of evidence presumptions are

ferent dates, to different parties, and the one last issued recites that the party therein named is appointed in place of the person named in the first commission, who is removed, it is presumed that the commission last issued is the one legally in force); *State v. Lord*, 118 Mo. 1, 23 S. W. 764 (the indictment being part of the record proper and always on file, when it is authenticated by the genuine signatures and indorsements of the prosecuting attorney, foreman of the grand jury, and the circuit clerk, there can be no question, in our opinion, but that the *prima facie* presumption is that it was lodged in that court in the manner prescribed by law. This presumption in favor of the correctness of official conduct is well established); *State v. David*, 131 Mo. 380, 33 S. W. 28 (the law presumes the coroner did his duty, and returned the depositions of each witness duly subscribed, as required by law. This presumption in favor of the correctness of official action has often been indulged by this court); *New River Mineral Co. v. Roanoke Coal & Coke Co.*, 110 Fed. 343, 49 C. C. A. 78 (if with this we take the presumption of law that the sheriff did his duty, the contrary not appearing (*Ross v. Read*, 1 Wheat. (U. S.) 486, 4 L. Ed. 141; *Gonzales v. Ross*, 120 U. S. 605, 30 L. Ed. 801, 7 Sup. Ct. Rep. 705), the conclusion must follow that the court below did not err in refusing

the motion to quash. "The presumption of law, until the contrary is proved, is that the officer has performed his duty (1 Greenl. Ev., § 40; *Freem. Exns.*, § 355; *O'Bannon v. Saunders*, 24 Gratt. (Va.) 138; *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; *Maury v. Cooper*, 3 J. J. Marsh. (Ky.) 224; and *Egery v. Buchanan*, 5 Cal. 53), and it is, therefore, to be presumed, in the absence of evidence to the contrary, that the return on the execution in this cause, being without date, was made while the sheriff had the right to make it, and in due time"); *Rowe's Admr. v. Hardy's Admr.*, 97 Va. 678, 75 Am. St. Rep. 811, 34 S. E. 625; *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 40 Am. St. Rep. 907, 36 Pac. 31 (every reasonable presumption will be indulged in favor of sustaining the ministerial acts of officers making judicial or execution sales); *Evans v. Robberston*, 92 Mo. 192, 1 Am. St. Rep. 701, 4 S. W. 941; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769, and note; *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613, 4 S. W. 232, and note. The regularity of a sheriff's sale is presumed: *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545; *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459, and note. The regularity of the proceedings leading up to a sheriff's sale will be presumed: *Leger v. Doyle*, 11 Rich. (S. C.) 109, 70 Am. Dec. 240. As to presumption of legality of interstate

continually made in cases of private persons, of acts even of the most solemn nature, when those acts are the natural results or necessary accompaniment of other circumstances. In aid of this salutary principle the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man in his private and official character does his duty until the contrary is proved; it will presume that all things are rightly done unless the circumstances of the case overturn this presumption, according to the maxim, *Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. Thus, it will presume that a man acting in a public capacity has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant of feoffment has been declared on, attornment will be in-

freight rates: *Hooker v. Interstate Com. Comm.*, 188 Fed. 242; *Eagle White Lead Co. v. Interstate Com. Comm.*, 188 Fed. 256. As to regularity of proceedings of state board on sale of lands: *People v. G. H. Hard Land Co.*, 51 Colo. 260, 117 Pac. 141. As to good faith and knowledge of board of commissioners: *State v. Chouteau County*, 44 Mont. 51, 118 Pac. 804; *Salt Lake County v. Clinton*, 39 Utah, 462, 117 Pac. 1075. As to statutory laying out of a highway: *Taylor v. Orfordville*, 147 Wis. 91, 132 N. W. 593; *Eyman v. People*, 6 Ill. 4; *Nealy v. Brown*, 6 Ill. 10. That a coroner's mode of taking a deposition was regular: *State v. David*, 131 Mo. 380, 33 S. W. 28. That the chairman of a city board of trustees had performed certain matters preceding a conveyance: *Green v. Barker*, 47 Neb. 934, 66 N. W. 1032. That a town meeting had been legally held:

Bishop v. Cone, 3 N. H. 513. That an old survey in a land office was correct: *Fisher v. Kaufman*, 170 Pa. 444, 33 Atl. 137. That the proceedings in a land office in issuing a patent had been regular: *Harkrader v. Carroll*, 76 Fed. 474, 18 Morr. Min. Rep. 474. See, also, the note to *Hall v. Stevenson*, 20 Am. St. Rep. 808. In addition to these authorities, see, also, cases cited in notes to *Douglas v. Bishop*, 45 Kan. 200, 10 L. R. A. 57, 25 Pac. 628, and *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Jover Y. Costas v. Philippine Islands*, 31 Sup. Ct. Rep. 664, 55 L. Ed. 884, 221 U. S. 623; *The Ship Poll Cary*, 45 Ct. of Cl. (U. S.) 219; *Smith v. Vickery*, 235 Mo. 413, 138 S. W. 502. Among the most important Canadian cases are: *Hewson v. Ontario Power Co.*, 36 S. C. R. 596; *Reg. v. Atkinson*, 15 Ont. Rep. 110; *Crookshank v. McFarlane*, 2 Atl. 544; *In re Morse*, 8 P. R. 475.

tended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party.”⁴ Mr.

⁴ The above excerpt is taken from the great decision of Mr. Justice Story, in *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 69, 6 L. Ed. 552, which has been cited and followed in other important cases. In *United States v. Greene*, 113 Fed. 683, we find: “The great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged. In support of this statement of the rule by the encyclopedia (12 Ency. Pl. & Pr. 277), from the supreme appellate courts of twenty-one states of the Union a large number of authorities are cited. Indeed, the necessity of showing prejudice to invalidate a criminal proceeding is a distinctive feature of the laws both of the state and of the United States. In *Doyle v. United States* (C. C.), 10 Fed. 269, 11 Biss. 100, it was held that the irregularity, even, of a judge communicating privately with one of the jurors while they are deliberating on their verdict furnishes no sufficient ground for reversal, where it is not claimed that it worked of necessity a prejudice to the accused. In the absence of any sufficient showing to the contrary, the presumption is that the jury was selected and drawn according to law: *Kie v. United States* (C. C.), 27 Fed. 351. In the absence of any sufficient showing to the contrary, it is presumed that the clerk did his

duty as jury commissioner, and that the other jury commissioner performed his duty also. This is an ancient principle of law, as old as Coke upon Littleton. ‘*Omnia prae-sumuntur rite et solemniter esse acta*’: Broom, Leg. Max. Justice Story, in the case of *Bank v. Dandridge*, 12 Wheat. (U. S.) 68. 6 L. Ed. 554, declares that the law presumes that every man in his private and official character does his duty, until the contrary is proved. It will presume that all things are rightly done unless the circumstances of the case overturn this presumption.” In *McKnight v. United States*, 122 Fed. 926, 61 C. C. A. 112, it was cited in support of the proposition that entries in the minute-book of a corporation showing the election of the defendant as director and president, together with evidence that he was acting at the time as president, were *prima facie* evidence that he was such president. See, also, *United States v. Mitchell*, 136 Fed. 896, 906; *Rennie v. Mutual Life Ins. Co.*, 176 Fed. 202, 206, 99 C. C. A. 556; *In re Jefferson Casket Co.*, 182 Fed. 689, 693; *La Clair v. United States*, 184 Fed. 128, 134. See note to *Wood v. Chapin*, 67 Am. Dec. 73. In *Belcher v. Harr*, 94 Ark. 221, 126 S. W. 715, the court held that the issuance of duplicate certificates under section 4747 of Kirby’s Digest of swamp land deeds “was an act of an official nature, and in the acts of such nature everything is presumed to be rightly and duly performed.” In *Naudain v. Naudain* (Del.), 75 Atl. 609, the court dealing with an undated affidavit said: “The affidavit was annexed to and filed with the petition, and the filing of

Justice Brewer says:⁵ "The fact that an official marriage license is issued carries with it a presumption that all statutory prerequisites thereto have been complied with.

the petition was the commencement of the suit. And although the notary public who made the certificate to the affidavit was appointed to office, as appears by his official seal, a very short time before the petition was filed, we will assume that the affidavit was taken, and the certificate made by the notary, after he was appointed and not before." In *Wright v. Giles* (Tex. Civ. App.), 129 S. W. 1163, with reference to the acknowledgment of an old deed, "it is to be presumed *prima facie* that the clerk did his duty and that the deed was so acknowledged as to properly admit it to record: *Crain v. Huntington*, 81 Tex. 615, 17 S. W. 243." See, also, *Holtan v. Beck* (N. D.), 125 N. W. 1048, in which the presumption of an existing vacancy in an office raised by the commission or certificate of appointment is considered. In *Landry v. Ramos Lumber & Mfg. Co.*, 124 La. 599, 50 South. 593, it is held that where, upon the face of the record, it appeared that a judgment was rendered on a particular day, and was filed on that day by the clerk of the court, it would be presumed that, in the absence of any suggestion to the contrary, it was entered upon the minutes on the same day. In *Floyd v. Ricketson*, 129 Ga. 668, 59 S. E. 909, it was held that in the absence of any proof to the contrary, it would be presumed that the ordinary signed the minutes of the court granting an administrator authority to sell the lands of his intestate. In *State v. Switzer*, 79 Neb. 78, 112 N. W. 297, the court would not presume a noncompliance by the commissioners of a county with a stat-

ute requiring bids for contracts for more than one hundred dollars to be advertised for. In *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076, "The law makes the secretary the custodian of the company's seal, and when his name is signed to an instrument a corporate seal attached must be presumed to be the company's seal and it must be presumed that the secretary sealed the instrument, with the authority of the company. (*Union Gold Mining Co. v. Bank*, 2 Colo. 227.) This presumption of authority is not overcome by the mere fact that no vote of the directors or other body exercising the corporate authority is shown." In *State v. Harter*, 131 Iowa, 199, 9 Ann. Cas. 764, 108 N. W. 232, we find "the setting forth of the commission or the particular powers of the officer and the source whence they are derived is not necessary, if he is alleged to hold an office which apparently confers upon him the authority to administer the oath in the particular case specified": *United States v. Wilcox*, 4 Blatchf. (U. S.) 391, Fed. Cas. No. 16,692. Moreover, the court is presumed to have authority to administer oaths to witnesses, and the act of the clerk of the court in administering such an oath is presumed to have been done under the authority of the court: *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385; *Keator v. People*, 32 Mich. 484; *State v. Spencer*, 6 Or. 152.

⁵ *Nofire v. United States*, 164 U. S. 657, 41 L. Ed. 588, 17 Sup. Ct. Rep. 212, citing *Bank of United States v. Dandridge*, *supra*; *Rankin v. Hoyt*, 45 U. S. (4 How.) 327, 11

This is the general rule in respect to official action, and one who claims that any such prerequisite does not exist must affirmatively show the fact." Mr. Justice White says:⁶ "The constitution of Mexico . . . made it the duty of the supreme executive power to cause to be published, circulated, and observed, the laws and the general constitution. In the absence of proof, the presumption of *omnia rita* creates the inference that the duty was performed." Illustrations might be given without number of the wide application of the great maxim referred to by these great lawyers, but reference is specially made to those carefully selected ones referred to in the note at foot.⁷

L. Ed. 996; *Butler v. Maples*, 76 U. S. (9 Wall.) 766, 19 L. Ed. 822; *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470; *Gonzales v. Ross*, 120 U. S. 605, 30 L. Ed. 801, 7 Sup. Ct. Rep. 705; *Callaghan v. Myers*, 128 U. S. 617, 32 L. Ed. 547, 9 Sup. Ct. Rep. 177; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 Sup. Ct. Rep. 290; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. Ed. 93, 95, 13 Sup. Ct. Rep. 267. In this last case it is said: "It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act."

⁶ *Hayes v. United States*, 170 U. S. 637, 42 L. Ed. 1174, 18 Sup. Ct. Rep. 735.

⁷ See cases collected in 9 Ency. of Ev., pp. 944, 945, to which valuable work acknowledgment is made for the reference to the following case. In a very old Kentucky case, *Hickman v. Boffman* (Hardin), 3 Ky. 356, 370, it says: "It is a principle of law, well settled, that every officer acting under the sanction of an oath, or in whom the government reposes a trust, shall be presumed to

have done his duty until the contrary be proved. This is a principle of the first necessity in society, and indispensable for the preservation of the rights of those who, by law, are obliged to commit their interest to the management of the public agents. The law reposes a special trust in the officer, and the citizen is obliged to trust him. Precarious and perplexing, indeed, would the situation of the individual be, if he were obliged to prove that the officer had done his duty; if the presumption of his having done it were not indulged until the contrary be shown. This principle is equally applicable to a proceeding against the officer, and to a proceeding against the right of an individual, derived through the act of the officer. It would be strange if it should be indulged in favor of the officer, who may have been guilty, and not in favoring the individual who has done no wrong. It was the duty of the officer, intrusted by the government, not to issue the grant in this case without the warrant having been lodged with the plat and certificate. He having issued the grant, we must presume that he had the warrant to authorize the grant, until the contrary be proven." See,

§ 43 (36). **Presumptions of authority from acting in official capacity—The English rule.**—Care must be observed that confusion does not arise between the two presumptions—that of the regularity of official acts and that of the authority from acting in an official capacity. The latter deals with the question of what original authority is to be presumed; the former, taking the authority for granted, assumes the regularity and order of the acts until the contrary appears. It has long been held that due appointment to office may be presumed, until the contrary appears, from the fact that one has acted in an official capacity. In England the rule has been held applicable to masters in chancery, surrogates, sheriffs, under-sheriffs, justices of the peace, constables and numerous other officers;⁸ and indeed is said to extend to all public officers. The same rule applies though the action be in the name of the officer, or though the title be directly put in issue by the pleading, or though the proceedings be criminal.⁹

also, the late cases: *State v. Montgomery* (Ala.), 59 South. 294; *Watkins v. Stough* (Ark.), 147 S. W. 443; *San Diego etc. R. Co. v. Board of Equalization* (Cal.), 127 Pac. 153; *Richards v. Kerr*, 53 Colo. 376, 127 Pac. 232; *State v. Florida East etc. R. Co.* (Fla.), 59 South. 385; *Nixon v. Lehman*, 137 Ga. 516, 73 S. E. 747; *Prothero v. Board*, 22 Idaho, 598, 127 Pac. 175; *Chicago etc. R. Co. v. Garrett*, 255 Ill. 420, 99 N. E. 643; *Town of Cicero v. Lake Erie etc. R. Co.* (Ind. App.), 97 N. E. 389; *City of Cherokee v. Illinois Cent. R. Co.* (Iowa), 137 N. W. 1053; *Southern R. Co. v. Alford*, 150 Ky. 808, 150 S. W. 985; *Hibernia etc. Trust Co. v. Whitney*, 130 La. 817, 58 South. 583; *Chetteville v. Grant*, 212 Mass. 17, 98 N. E. 616; *Smith v. Duluth Log Co.*, 118 Minn. 432, 137 N. W. 6; *Gass v. Evans*, 244 Mo. 329, 149 S. W. 628; *State v. Brodegan*, 34 Nev. 486, 125 Pac. 699; *State v. Romero* (N. M.), 124 Pac. 649; *People v. Bowe*, 134 N. Y. Supp. 521; *Hack-*

ney v. Elliott (N. D.), 137 N. W. 433; *Hendry v. City of Salem* (Or.), 129 Pac. 531; *Greenough v. Board*, 33 R. I. 559, 82 Atl. 406; *McDowell v. Burnett* (S. C.), 75 S. E. 873; *Ex parte Hunt* (Vt.), 82 Atl. 178; *Gould v. Killen* (Wis.), 139 N. W. 758.

⁸ *Marshall v. Lamb*, 5 Q. B. 115, 114 Eng. Reprint, 1192; *Rex v. Verelst*, 3 Camp. 432; *Bunbury v. Matthews*, 1 Car. & K. 380; *Plumer v. Brisco*, 11 Q. B. 46, 116 Eng. Reprint, 392; *Berryman v. Wise*, 4 Term Rep. 366, 100 Eng. Reprint, 1067. As to the mode of appointment of officers, see § 205, *post*.

⁹ *Cannell v. Curtis*, 2 Bing. N. C. 228, 2 Scott, 379; *Hayes v. Dexter*, 13 Ir. L. Rec., N. S., 22. Some of the older English cases have an interesting bearing on the subject. In the case of the Abbot of Fountain, in the Year-Books 9 H. 6, folio 33, one who was in the office of abbot of a religious house under the color of an election, when he in truth had

§ 43a (36). **Same — The American rule.** — Generally speaking, the American rule is as broad as the English, and it has been applied in a great variety of cases, which almost uniformly support the doctrine of presumption in favor of the authority. Not less than their brethren across the water, American jurists uphold, that from the fact of one having acted in an official capacity arises the presumption of his due appointment to the office, until of course the claim can be successfully challenged. It has been recognized that it would cause great inconvenience if, in the first instance, strict proof were required of appoint-

only a minor part of the votes, made an obligation as abbot for goods sold for the use of the house. It was held that this obligation was not voidable by the true abbot who was elected by a major part of the votes, when he recovered the office, because he who made the obligation had color of title, having had some votes, and those who sold goods to the house were not bound to examine his title to the office. In *Knowles v. Luce, Moore* (K. B.), 112, 72 Eng. Reprint, 473, it was said there was a distinction between copyholds granted by a steward who had color but no right to hold a court, and copyholds granted by one who had neither color nor right; and that a grant by a steward who had only color of right to hold a court was valid, because the tenants were not bound to examine his authority, nor was he bound to give them an account of it: *Comyn's Digest*, "Copyhold," c. 5. The case of *Leak v. Howel*, Cro. Eliz. 533, 78 Eng. Reprint, 780, was an information for bringing certain goods into the country by way of merchandise, "the custom and subsidy for them due and not being paid nor agreed for with the customer of London, nor in any other port, nor with their deputy." It was found in a special verdict that the goods were brought

into the country, and an agreement made at the custom-house in Penryn with Richard Enys, who had exercised there the office of deputy of J. Basset, who was a deputy of T. Peyton, the customer there, to answer to the queen all customs and duties. It was objected that the agreement was not valid because made with a deputy of a deputy. To this it was answered that Enys was deputy *in fact*, and although he were not deputy *de jure*, that shall not prejudice the merchants, for it would be mischievous to them to examine by what authority the officers of the customs sit and make their compositions. And of this opinion were all the barons and judgment was given for the defendant. In *Harris v. Jays*, Cro. Eliz. 699, 78 Eng. Reprint, 934, the case was that the queen's auditor and surveyor for the county of Northampton appointed a steward for one of the manors; and he kept the court and granted by copy lands which had escheated to the queen for felony. The question was whether the grant was good. It was decided that the auditor and surveyor had no authority to appoint the steward, and that the grant by the steward was void. It was conceded that the law favors acts of one in reputed authority, and that acts of necessity done by

ment or election to office in all cases where it might be only collaterally in issue, and it imposes no hardship, in most cases, to indulge the presumption that one assuming to be a public officer is not an intruder and violater of the law. Indeed, but for such a presumption, acting officers would find no protection in the discharge of public duties. It is a general rule that the best evidence should be produced of which any case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact. Its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession

an officer *de facto* are valid; but the grant in that case was held to be void, because it was a new grant in prejudice to the queen, merely voluntary, and which the steward was under no necessity to make: Co. Litt. 58, b; 4 Coke, 30; Parker v. Kett, 1 Salk. 95, 91 Eng. Reprint, 88; O'Brian v. Knivan, Cro. James, 552, 79 Eng. Reprint, 473. The case of The King v. Lisle, Andrews, 163, 95 Eng. Reprint, 345, and 2 Strange, 1019, 93 Eng. Reprint, 1051, was an information in the nature of a *quo warranto*, brought against Lisle for acting as a burgess of Christ Church, in the county of Southampton. There were two questions in the case: 1. Whether one Goldwire, who presided at the election of the defendant, was a mayor *de facto*; and 2. If he was, whether the presiding of a mayor *de facto* was sufficient to make a title in the defendant against the crown. As to the first point, it was found that Goldwire was never elected mayor, nor had any right or title to the office, but under pretense and color of being elected, he was sworn, and acted as mayor all the year. All the judges were of opinion that Goldwire must be taken to have been a mere usurper, and that to constitute a man an officer *de facto* there must

be at least the form of an election, although that, upon legal objections, may afterward fall to the ground. It is settled that where there is an officer *de facto* a court will not grant a *mandamus* to compel a new choice, until such officer has been made a party to the proceeding, nor then unless in a very clear case. If there be any doubt, his right is to be settled by a *quo warranto*: Rex v. Bankes, 1 W. Black. 445, 3 Burr. 1452, 97 Eng. Reprint, 922; Rex v. Mayor etc. of Cambridge, 4 Burr. 2008, 98 Eng. Reprint, 46; Rex v. Colchester, 2 Term Rep. 259, 100 Eng. Reprint, 141; Rex v. Bedford, 1 East, 79, 102 Eng. Reprint, 31. Where a statute made provision for the appointment of justices of the peace in a certain place, and declared that no person should be authorized to act as a justice unless he should have taken certain oaths, it was held that the acts of a justice appointed under the statute, but who had not taken the oaths, were not void; that it was unlawful for him to act without taking the oaths, and he might be punished by indictment for so acting, but his acts were valid: Margate Pier v. Hannam, 3 Barn. & Ald. 266, 106 Eng. Reprint, 661.

of the party, to prevent fraud. This rule, however, was adopted for practical purposes, and should be so applied as to promote the ends of justice. It is therefore subject to exceptions, where the general convenience requires it, and naturally leads to the division of evidence into primary and secondary classes. Among the exceptions to the foregoing general rule, proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character, without producing his appointment.¹⁰ Phillips says: "It is not in general necessary to prove the written appointments of public officers; for this would be attended with general inconvenience, and a strong presumption arises from the exercise of a public office that the appointment to it is valid. The cases upon this subject sometimes appear to be governed by the doctrine of admissions, but it will be seen by the example that the exception is of a more extensive nature. In the case of all peace officers, justices of the peace, constables, etc., it is sufficient to prove that they acted in these characters; without producing their appointments."¹¹ The principle on which the whole doctrine of the recognition of *de facto* officers and their acts rests is not how they happen to act *de facto*—whether the cause be an illegal appointment or election, or an illegal holding over, but it is the convenience of the public—the necessity of the thing—the impossibility of one always knowing when an officer to whom he goes on business of a ministerial character is legally in office, was properly elected or has held too long. It is that, where the public servant is acting in the place apparently all right and the applicant to him in good faith has a deed witnessed or an oath administered, that it is better for society that the act *de facto* stand than that the business of society, the title to property, be all wrecked, because the party did not know that the term of office of the public

¹⁰ Greenl. Ev., § 83; Berryman v. Wise, 4 Term Rep. 366, 100 Eng. Reprint, 1067; Wilcox v. Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; United States v. Reyburn, 6 Pet. (U. S.) 352, 367, 8 L. Ed. 424;

Rex v. Gordon, 2 Leach, 581, 585, 586; Rex v. Shelley, Id. 581, n; Bryan v. Walton, 14 Ga. 185; Allen v. State, 21 Id. 217, 68 Am. Dec. 457.

¹¹ Phillips on Ev., p. 432.

official expired the day before.¹² It is said by Greenleaf¹³ that proof that an individual has acted notoriously as a public officer is, *prima facie*, evidence of his official character, without producing his commission or appointment; and again, that it is not, in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears; and it is not material how the question arises, whether in a civil or criminal case, nor whether the officer is or is not a party to the record. The rule is of long standing and the reason of the doctrine is founded mainly on public convenience.¹⁴ In practice it is not likely to work any serious mischief nor to be abused; since a suit against a person claiming to act as a public officer, for any act affecting the person or property of another, will compel him to show himself legally entitled to it, or he must be held answerable for such acts, done under color of an office to which he had not a valid title.¹⁵ The public, who have an interest in the continuous discharge of official duty, and whose necessities cannot wait the slow process of a litigation to try the title, have the right to treat as valid the official acts of the incumbent, with whom alone, under the circumstances, they can transact business. This rule is an obvious and necessary one for the protection of organized society; for the affairs of society cannot be carried on unless confidence were reposed in the official acts of persons *de facto* in office.¹⁶ Private individuals, in controversies between themselves, are not permitted to question the acts of an officer *de facto*, for the further reason, that to do so would be to raise and determine the title to his

¹² Smith v. Bondwiant and Meador, 74 Ga. 419, 58 Am. Rep. 438.

¹³ 1 Greenleaf, Ev., §§ 83, 92. See, also, 2 Bishop, Crim. Proc., §§ 783, 828, where this proposition is indorsed.

¹⁴ State v. Roberts, 52 N. H. 492.

¹⁵ Tucker v. Aiken, 7 N. H. 113, in which Parker, J., declaring the

general principle that the acts of an officer *de facto* are valid, so far as the public or the rights of third persons are concerned, and that the title of such an officer cannot be inquired into in any proceeding to which he is not a party, applied it to the case of a collector of taxes.

¹⁶ Weeks v. Ellis, 2 Barb. (N. Y.) 325.

office in a controversy to which he was not a party, and in which he could not be heard. And this, says Parsons, C. J., "would be judging a man unheard, contrary to natural equity, and the policy of the law. From considerations like these has arisen the distinction between the holding of an office *de facto* and *de jure*."¹⁷ It is an established principle of law that the acts of an officer, having color of title, in the exercise of the ordinary functions of his office, are valid in respect to the rights of third persons who may be interested in such acts. "The adoption of such a rule is necessary to prevent a failure of justice, and the great public mischief which might be otherwise justly apprehended. Besides, the officer's title ought not to be determined in a collateral way."¹⁸

§ 44 (37). Same — Not restricted to official appointments.—To those who follow with any historical interest the evolution of the law of evidence, there is discoverable in it an almost arboreal growth—the increase of the bole in girth as principle upon principle swells its volume, no less than the extension of the branches in length as the effect of adopted principles in their application—the fact that authority from being presumed in those acting in an official capacity has grown and extended to a like application to many not acting in a strictly official position. It has been applied to constables and watchmen appointed

¹⁷ Fowler v. Bebee, 9 Mass. 234, 6 Am. Dec. 62.

¹⁸ Cooley, J., in the Auditors of Wayne County v. Benoit, 20 Mich. 176, 187, 4 Am. Rep. 382. Citing Bucknam v. Ruggles, 15 Mass. 182. See, also, Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 575 (grand juror); Coles County v. Allison, 23 Ill. 383 (or, Ed.) 437 (town officers); Creighton v. Piper, 14 Ind. 182 (supervisor); Commissioners v. Anderson, 20 Kan. 298, 27 Am. Rep. 171 (county commissioners); Rounds v. Bangor, 46 Me. 541, 74 Am. Dec. 469 (pound-keeper); Conolly v. Riley, 25 Md. 402 (notary public); Com-

monwealth v. McCue, 16 Gray (Mass.), 226 (pound-keeper); Tucker v. Aiken, 7 N. H. 113 (town collector); State v. Roberts, 52 N. H. 492 (collector of taxes); Colton v. Beardsley, 38 Barb. (N. Y.) 29 (trustees of a school district); People v. Stevens, 5 Hill (N. Y.), 630 (town clerk); Commissioners v. McDaniel, 7 Jones (N. C.), 107 (town commissioners); Baird v. Bank of Washington, 11 Serg. & R. (Pa.) 411 (bank director); Killpatrick v. Frost, 2 Grant Cas. (Pa.) 168 (marshal); McCormick v. Cleveland, 98 Wis. 522, 62 Am. St. Rep. 527, 74 N. W. 339 (justice of the peace).

by commissioners under a local act, and to trustees empowered by act of parliament to raise money to build a church.¹⁹ The same presumption has been applied where professional men, as surgeons and attorneys, have brought action for slander or libel in their professional capacity, although these cases may rest on the principle that the professional capacity of the plaintiff had been recognized or admitted in the defamatory language; and in such cases, if the professional capacity of the plaintiff is denied, there should be proof of appointment or of authority to act.²⁰ Said Chief Justice Marshall: "Natural persons may appear in court, either by themselves or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact the attorney of another. The case of an attorney at law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable." "Certain gentlemen, first licensed by the government, are admitted by order of court, to stand at the bar with a general capacity to represent all suitors. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from

¹⁹ Butler v. Ford, 1 Crompt. & M. 662 (evidence of the defendants acting as constables and watchmen under the town commissioners held *prima facie* sufficient to entitle them to the protection of an act requiring notice before action, without proof of their appointment); Best on Ev., 10th ed., § 357; Druse v. Wheeler, 22 Mich. 443: "It was alleged as error that parol proof was admitted—that certain of the defendants were acting trustees of the church. But the

rule is well settled that, except for some peculiar purposes, such evidence is sufficient. The court could not try titles to office in any such litigation as the present: Cahill v. Kalamazoo Mutual Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457."

²⁰ Berryman v. Wise, 4 Term Rep. 366, 100 Eng. Reprint, 1067; Collins v. Carnegie, 1 Ad. & El. 695, 110 Eng. Reprint, 1373. See discussion of the subject, Tayl. Ev., 10th ed., 33, 173, 174, 175.

the first establishment of our courts, and no departure from it has been made in those of any state or of the Union.”²¹

§ 44a (37). Same—Qualified application to private appointments.—While the principle has been extended in the manner shown, it is nevertheless limited in its application, and only those special cases falling within the rule laid down in the preceding section are entitled to its protection. Where it was sought to establish by parol evidence the appointment by the court of a guardian for a free person of color, in that he had held himself out to the world as such guardian, it was necessary to prove his appointment.²² While each case must rest on its own circumstances, it is impossible to say that the rule is absolute one way or the other, but so far as one may take the risk of defining a *media via*, it will be safe to assume that in a purely private and unofficial appointment, if there is written evidence of the appointment, it should be proved.²³ In the

²¹ Osborn v. Bank, 9 Wheat. (U. S.) 738, 829, 6 L. Ed. 204, 226; In re Gasser, 104 Fed. 537, 44 C. C. A. 200. Thus an attorney who files papers is presumed to have authority to do so: Beem v. Kimberley, 72 Wis. 343, 39 N. W. 542; Field v. Proprietors, 1 Cush. (Mass.) 11; Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Penobscot Boom Co. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. When an attorney appears and commences an action, he is presumed to have authority: McAlexander v. Wright, 3 B. Mon. (Ky.) 189, 16 Am. Dec. 93. What the late A. C. Freeman, the well-known author of “Judgments” and “Executions,” had to say on any subject is always illuminating. In an excellent note to the last-named case he deals exhaustively with the presumption in favor of the authority of an attorney who appears in a cause, the right to inquire into such authority, where and how the question may be

determined and what proof will sustain the authority when impugned.

²² We recognize the rule, originating in motives of public convenience, that where an individual has acted notoriously as a public officer, it is *prima facie* evidence of the official character which he assumes; and his commission or appointment need not be produced: 4 Term Rep. 366, 5 Barn. & Ald. 243, 6 Pet. 352, 367, 12 Wheat. 70, 1 Brock. 520. Whether the same doctrine applies to an office which is private, as that of trustee, is questionable: 1 Jac. & W. 464, 468. The better opinion seems to be, that in such case, some proof would have to be offered of the existence of the office, and of the appointment of the ostensible agent to it: Bryan v. Walton, 14 Ga. 185.

²³ Gilbert v. Boyd, 25 Mo. 27: “As the record stands, we do not see that there was any written evidence of the appointment of the trustees.

matter of private appointments, the question of agency is invariably involved. In general, the fact of an agency created by writing cannot be proved by parol, unless the nonproduction of the writing is first accounted for.²⁴

§ 45 (38). Performance of official duty—Generally.—In the preceding sections one aspect of the ruling maxim *omnia praesumuntur rite et solemniter esse acta*, in its relation to the presumption of authority and regularity, has been considered, and it now devolves upon us to consider its connection with the rule that public officials do their duty. The maxim does not rest alone on the ground that the official act is performed by an officer who has taken the oath of office, though undoubtedly this is one of the considerations which support the presumption of regularity in such cases; and we find the statement constantly recurring in judicial decisions that sworn public officials are presumed to have properly performed their duties in the absence of evidence to the contrary.²⁵ Where the Secretary of the Interior had ordered a repayment of certain moneys on the relinquishment by the claimants of all claim to land canceled, and such relinquishment was made “as required by the rules and regulations of the land office,” it was presumed that the Secretary did his duty and exacted the performance of all that the law required.²⁶

If there was none, the fact, of course, might have been proved by parol. We do not know that the rule which permits civil officers and officers of corporations to be proved to be such by reputation and their acts extends to private trustees when there is written evidence of their appointment. It is said an agent may prove his agency when it is by parol. (Greenl., § 416.) The official character of officers, both civil and corporate, may be proved by acts and reputation. (Cowen's Notes, 554; United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.)”

²⁴ Cowen's Notes, 1208.

²⁵ Squier v. Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Far v. Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396; Templeton v. Morgan, 16 La. Ann. 438; Ross v. Reed, 1 Wheat. (U. S.) 482, 4 L. Ed. 141; Hickman v. Boffman, Hardin (3 Ky.), 348; State v. Rosenthal, 123 Wis. 442, 102 N. W. 49; United States v. Commonwealth Trust Co., 193 U. S. 651, 48 L. Ed. 830, 24 Sup. Ct. Rep. 546; Hackfeld & Co. v. United States, 197 U. S. 442, 49 L. Ed. 826, 25 Sup. Ct. Rep. 456. See, § 30, ante.

²⁶ United States v. Commonwealth Title Ins. & Trust Co., 193 U. S. 651, 48 L. Ed. 830, 24 Sup. Ct. Rep. 546.

Where a United States attorney made a stipulation in a cause that the escape of certain immigrants could not have been anticipated by the master or officers of a steamship, which the trial court held was the statement of a mere conclusion not binding upon the court, Mr. Justice Day said on the appeal: "We know no rule of public policy which will prevent the United States attorney from stipulating with the defendant, in a case of this character, as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the government, and not stipulate away the rights of the prosecution." The presumption is that officers will perform their duties according to law and persons dealing with them may rely upon that presumption.²⁷ In a Missouri case²⁸ the court announced the rule that as long as a man or a body of men fill any official position, the law presumes he or they will perform their duties whenever any matter is legally presented to them for action, notwithstanding general declarations previously made to the contrary. This is true, for the obvious reason that no officer can legally act or illegally decline to act until a matter is legally presented to him, calling for his official action in the premises. We have already given²⁹ instances of the broad application of the maxim, and inasmuch as the presumption has been applied to acts of officers of almost every class, the instances already given and those in the sections following will be found to sufficiently illustrate the rule.³⁰

²⁷ *State v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

²⁸ *State v. Adcock*, 225 Mo. 335, 124 S. W. 1100.

²⁹ § 30, *ante*.

³⁰ *Schermerhorn v. Talman*, 14 N. Y. 93, presumed clerk of court properly administered oath. *Surveys* by public officers regular on face are presumed *prima facie* correct: *Findley v. McCormick*, 50 Ind. 19; *Trotter v. President*, 9 Mo. 69; *Harris v. Burchan*, 1 Wash. C. C. 191, Fed. Cas. No. 6117; *Baeder v. Jennings*, 40 Fed. 199. This pre-

sumption is frequently extended in the *official acts of sheriffs* and similar officers: *Shorey v. Hussey*, 32 Me. 579; *Conwell v. Watkins*, 71 Ill. 488; *Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632; *Cooper v. Granberry*, 33 Miss. 117; *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; *Hefner v. Hesse*, 29 La. Ann. 149; *Sadler v. Anderson*, 17 Tex. 245. Thus a sale by a sheriff under execution is presumed to have been made at proper time and place (*Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769); and the property

§ 45a (38). Same—Limitation of presumption.—Before giving the further illustrations referred to, this is a fit place to record such qualification of the use of the pre-

levied on by him to be rightfully in his possession (*Wafer v. Pratt*, 1 Rob. (La.) 41, 36 Am. Dec. 581), and that the recitals in his return are correct (*Nichols v. McCall*, 13 La. Ann. 215; *Case v. Colston*, 1 Met. (Ky.) 145); that before a sale a levy and notice of sale had been made (*Smith v. Hill*, 22 Barb. (N. Y.) 656; *Culbertson v. Milhollin*, 22 Ind. 362, 85 Am. Dec. 428); that the deed was executed in due form (*Armstrong v. McCoy*, 8 Ohio, 128, 31 Am. Dec. 435), and a proper return made (*Conwell v. Watkins*, 71 Ill. 488; *New River Mineral Co. v. Roanoke C. & C. Co.*, 110 Fed. 343, 49 C. C. A. 78); that where land was bought sixty years previously at a sheriff's sale, the sheriff duly executed a proper deed to the purchaser (*Coulson v. Scott*, 167 Ala. 606, 52 South. 436); that a deputy sheriff duly collected and accounted for taxes as it was his duty to do (*Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507); that sheriffs acted regularly in their offices and the officer serving a writ of replevin took the statutory bond (*Massachusetts Brewery Co. v. Herman*, 106 Me. 524, 76 Atl. 943; *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, 106 Pac. 111; *Shelton v. Franklin*, 224 Mo. 342, 135 Am. St. Rep. 537, 123 S. W. 1084). Where an officer had taken property on a writ of replevin and turned the same over to the plaintiff, there was a presumption that the bond which he took was taken before the property was turned over: *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985. Where at a sheriff's sale property was sold at a farmhouse, to which the sale had been adjourned, and there was no evidence that the farmhouse was not a public

place within the meaning of the law, it was presumed that it was, as such fact, coexisting with the sale, was essential to the validity of the act of the sheriff in making the sale: *Fairbanks v. Benjamin*, 50 Vt. 99. Where an officer advertised and sold property on an execution, and his return did not show that the property was advertised and sold in the town in which it was taken, as the law required, this attendant fact was presumed: *Jewett v. Guyer*, 38 Vt. 209. Where in an action of debt on a jail bond, the plaintiff alleged a commitment to the jail in the city of Vergennes on an execution issuing from Addison county court, it was held that, since in one contingency such commitment to that jail would be lawful, the court would presume that such contingency existed, and the declaration was held good: *Bank v. Tucker*, 7 Vt. 134. Where selectmen made and had recorded a certificate of alterations in a highway necessary to the construction of a railroad, but required to be by agreement between the selectmen and the railroad company, a presumption of the prior agreement requisite to the regularity of the certificate was held to arise: *Wead v. St. J. & L. C. R. Co.*, 64 Vt. 52, 24 Atl. 361. Where school district officers paid out money for repairs on a schoolhouse, and there was no evidence that the district had ordered them so to do, the presumption of previous authorization was held to have arisen: *Brock v. Bruce*, 59 Vt. 313, 10 Atl. 93. This presumption applies to acts of attorneys and notaries (*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262), assessors (*Perkins v. Nugent*, 45 Mich. 156, 7 N. W. 757; *Southland Lumber Co. v. McAlpin*, 126 La.

sumption as is sometimes called for. While the law will presume in favor of the regularity of an official's act, it will not by such presumption supply the necessary jurisdictional facts.³¹ The rule and its exception are well stated

906, 53 South. 45; *People v. Hulin*, 237 Ill. 122, 86 N. E. 866), clerks of court (*Niantic Bank v. Dennis*, 37 Ill. 381; *Craig v. Adair*, 22 Ga. 573), recording officers (*Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Collins v. Val-leau*, 79 Iowa, 626, 43 N. W. 284, 44 N. W. 904), constables (*Richardson v. Smith*, 1 Allen (Mass.), 541); to *principal of a high school* (*Wertz v. School District*, 43 Pa. Sup. Ct. 1); to *medical examiner's board* (*State Board v. Taylor* (Tex.), 129 S. W. 600); to a *justice's certificate* to a deed (*Brown v. Hutchison*, 155 N. C. 205, 71 S. E. 302). As to the presumption that railroad rates for local traffic established pursuant to statute are reasonable, see *State of North Dakota v. Northern Pac. Ry. Co.* (N. D.), 120 N. W. 869, 25 L. R. A., N. S., 1001, and note thereto, and also notes in *Winchester etc. Road Co. v. Croxton*, 33 L. R. A. 183, and *Pennsylvania R. Co. v. County of Philadelphia*, 15 L. R. A., N. S., 108. Where the *Secretary of State* had issued a license to a foreign insurance company, there was held to be presumption that the company had filed in the proper office a copy of its by-laws, since without this antecedent act the license could not have been legally issued. The presumption exists as to *military and fiscal officers* of the United States: *United States v. Crussell*, 14 Wall. (U. S.) 1, 20 L. Ed. 821. For further illustrations, see *McCarthy v. Merced County*, 15 Cal. App. 576, 115 Pac. 458; *Hamby v. Collier*, 136 Ga. 309, 71 S. E. 431; *Nelson v. People*, 23 N. Y. 293; *Parkinson v. Bracken*, 1 Pinn. (Wis.) 174, 39 Am. Dec. 296; *Forsaith v. Clark*, 21 N. H. 409; *Bullen v. Arnold*, 31 Me. 583; *People v.*

Montez, 48 Colo. 436, 110 Pac. 639; *City St. Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933; *State Board of Medical Examiners v. Taylor* (Tex.), 129 S. W. 600; *In re City of New York*, 137 App. Div. 803, 122 N. Y. Supp. 656; *Schultz v. State*, 112 Md. 211, 76 Atl. 592. See note in *Douglass v. Bishop*, 10 L. R. A. 857. See, also, 22 Am. & Eng. Ency. of Law, tit. "Presumption," p. 1270 et seq., where further illustrations (with authorities) of the presumption have been alphabetically classified, in its application to administrators, army and military officers, attorneys, attorneys general, clerks of court, commissioners to take testimony, constables, county officers, election officers, governors, judges, justices of the peace, marshals, municipal officers, notaries public, patent officers, police officers, poor officers, the President of the United States, public land officers, public surveyors, receivers, recording officers, school officers, Secretaries of State, sheriffs, state auditors, taxing officers and officers of the treasury department.

³¹ *Ware v. Clark* (Tex. Civ. App.), 125 S. W. 618, where the jurisdiction of the trial court did not appear from the transcript: *Glasscock v. Barnard* (Tex. Civ. App.), 125 S. W. 616, where no citation appeared in the record. The court said that the holding was analogous to the holding in *American Soda Fountain Co. v. Mason*, 55 Tex. Civ. App. 532, 119 S. W. 714, and the line of authorities therein cited, to the effect that no presumptions are to be indulged in aid of the trial court's jurisdiction but the same must be made affirmatively to appear. See, also, *Garrison v. Arnett* (Tex. Civ.

by Haselton, J., in a recent Vermont case.³² Where the regularity of an official act is dependent upon some co-existing or pre-existing act or fact, there is a presumption in favor of the doing of such act or the existence of such fact, but the rule cannot be construed as to permit the presumption to alter the rule that the existence and contents of a record must be proved by the record, unless

App.), 126 S. W. 611; Throop on Public Officers, §§ 559, 560; Cook v. Borough of Manasquan (N. J. L.), 76 Atl. 310, in which the minutes of a borough council kept by the clerk thereof showed that an ordinance, authorizing proceedings to condemn land for a public street, on its final passage "was carried on roll-call" on *certiorari* prosecuted by a land owner affected. Held, (a) that the record as it stands is not sufficient to show that it received the vote of the majority of the whole council (P. L. 1897, p. 295, § 26), (b) that there was no legal presumption, as against the land owner in a proceeding to condemn, that the ordinance received the requisite number of votes; (c) that the record cannot be enlarged or omissions supplied by parol, where such omissions are of jurisdictional facts; Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co., 140 Mo. App. 374, 124 S. W. 1094, where a replevin bond had to be approved by the sheriff and it bore across its face that it was approved by a circuit clerk, who had no authority either to take or approve it. If there had been no actual indorsement of approval by anyone, then the evidence of approval might be sustained by the presumption that the law attaches to the official acts of the sheriff. Presumptions have no place in the presence of actual facts. As was said in the case of Mockowik v. Kansas City, St. J. & C. B. R. Co., 196 Mo. 550, 94 S. W. 256: "Presumptions may be looked on as the bats of

the law, flitting in the twilight, but disappearing in the sunshine of actual facts." The "sunshine of actual facts as to the approval of this bond is written across its very face—Approved this 21st day of December, 1906, T. A. Nicholson, Clerk, by S. A. Reed, D. C.' There is no room left for a presumption. Again, in order to maintain respondent's contention, we have to base one presumption upon another. We have to presume, in the first place, that the replevin bond was delivered to the sheriff, and then we have to presume from that delivery and the sheriff's official action that he approved the bond. Presumptions must be based on facts, and one presumption cannot be based upon another: 16 Cyc. 1051"; St. Louis & S. F. R. Co. v. Newell, 25 Okl. 502, 106 Pac. 818. (The *prima facie* presumption of the reasonableness, justness, and correctness of an order of the corporation commission, obtaining by reason of section 22, article 9 of the constitution, applies only to the facts found by the commission, or established by evidence upon which the commission failed to make a finding; and, where a fact material to the reasonableness, justness, and correctness of an order is lacking in the finding of facts made by the commission, and is not supplied by the evidence, the presumption obtaining by reason of said section does not apply, and on review in this court such order cannot be sustained.)

³² Bacon v. Boston & M. R. R., 83 Vt. 421, 76 Atl. 128.

something is shown which prevents or excuses the production of the record.³³ In the case referred to, in which Haselton, J., delivered a useful opinion, it was erroneously claimed that the presumption existed that a certificate, required by statute, of the completion and opening of a highway had been duly filed in the proper office of the municipality, notwithstanding the fact that the statute also provided that "the day on which such certificate shall be recorded shall be deemed the time of the opening such highway."

§ 46 (39, 40). **Same—Acts of municipal officers.**—The application of the presumption to the acts of the officers of municipal corporations has been uniform with their growth, and is to be found in a multitude of decisions on almost every possible point presented by the ramifications of the law relating to them.³⁴ It was applied in the fol-

³³ Sherwin v. Bugbee, 17 Vt. 337; Brunswick v. McKean, 4 Me. 508; United States v. Ross, 92 U. S. 281, 23 L. Ed. 707.

³⁴ Thus it will be presumed that *ordinances* have been properly passed: City of Louisville v. Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; In re Board of Rapid Transit Commissioners, 18 N. Y. Supp. 320; City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235, it was held that the same presumptions obtain that a *city ordinance* was legally passed as in the case of an act of the legislature; that special meetings have been regularly called: Wallace v. First Parish, 109 Mass. 263; Tierney v. Brown, 65 Miss. 563, 7 Am. St. Rep. 679, 5 South. 104; Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. Supp. 357. See, also, 2 Dillon, Mun. Corp., 5th ed., § 538, and note; and *adjournments* regularly taken: Freeholders v. State, 24 N. J. L. 718. See, also, Scott v. Paulen, 15 Kan. 162, 167; Downing v. Miltonvale, 36 Kan. 740, 14 Pac. 281; O'Mally v.

McGinn, 53 Wis. 353, 10 N. W. 515; Town of Eldora v. Burlingame, 62 Iowa, 32, 17 N. W. 148; Atchison Board of Education v. DeKay, 148 U. S. 591, 601, 37 L. Ed. 573, 13 Sup. Ct. Rep. 706. In the last-named case the validity of *bonds* of a city issued twenty years prior to suit was attacked on the ground of irregularity in the meetings which culminated in the necessary consent to the issue. In his opinion upholding the validity of the bonds Mr. Justice Brewer said: "More in point is the case of Scott v. Paulen, 15 Kan. 162, 167, in which a session of a board of county commissions was held to be valid, at which only two of the three members were present; and the record failed to show either an adjournment to that date or a call for a meeting at that time, but did show that it was not held on the regular days of session; but its validity was not challenged until some time thereafter. In the opinion in that case, written by the same judge who wrote the opinion in Paola etc. R. Co. v. Anderson County

lowing case in the supreme court of the United States. In an action on municipal bonds it appeared that an election had been held, that the votes cast had been canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it was held a

Comms., 16 Kan. 302, occurs this language: 'Hence it seems to us that when a quorum of the county board, with the clerk, is present, assuming to act as a county board, and at a time and place at which a legal session is possible, and to such board in actual session a proper and legal petition is presented for a county seat election, and an election ordered, and thereafter full and legal notice given of such election, two elections had, generally participated in by the electors, the result canvassed and declared, and no objection made thereto for more than a year, it will be too late to question the validity of the election on the ground that the record of the proceedings of the commissioners shows that the chairman was absent, and fails to show a session pursuant to a legal adjournment from a regular session, or that the session was a special session and duly called by the chairman on the request of two members.' See, also, 2 Dillon Mun. Corp., 5th ed., § 535, and note. See, also, Schott v. People, 89 Ill. 195; that all formalities have been complied with in the making of contracts: New Orleans v. Halpin, 17 La. Ann. 185, 87 Am. Dec. 523; Jackson School Township v. Hadley, 59 Ind. 534. The validity of bonds: the fact that municipal bonds bore a date prior to the time the ordinance authorizing their issue went into effect was insufficient to defeat a recovery on the bonds, where there was no proof of the date of their actual issue, and their premature issue would have been contrary to the recitals on the

face of the bond: Village of Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281; Perkins County v. Graff, 114 Fed. 441, 52 C. C. A. 243; that elections were legally held: Mussey v. White, 3 Me. 290; that the municipality is regularly organized: Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; Bassett v. Porter, 4 Cush. (Mass.) 487; Sherwin v. Bugbee, 16 Vt. 439; People v. Farnham, 35 Ill. 562; People v. Maynard, 15 Mich. 463; New Boston v. Dunbarton, 18 N. H. 409; Robie v. Sedgwick, 35 Barb. (N. Y.) 319; that a town has the requisite number of officers: Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223. When a person acts as an officer of a corporation and is recognized as such, a regular appointment will be presumed: United States Bank v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Kiley v. Forsee, 57 Mo. 390. When the treasurer of a town made a payment upon a debt owed by the town, and there was no proof of authorization of the town, the approbation of the town was to be presumed: Sargeant v. Sunderland, 21 Vt. 284. In like manner acts published in the usual manner and among the public acts will be presumed to have been regularly passed: Illinois Central Ry. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91; People ex rel. Barnes v. Starne, 35 Ill. 121, 85 Am. Dec. 348, and elaborate note. For mode of determining whether a statute was legally enacted, see § 117, post. That custodians of public documents have performed their duty by keeping and preserving them: Hemingway v.

proper presumption that due notices of the election had been given on the ground that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act.³⁵ In another case:³⁶ "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. . . . If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed . . . in short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them as matters of right or matters of duty." Although in that case municipal

State, 68 Miss. 371, 8 South. 317; Hall v. Kellogg, 16 Mich. 135; Morrill v. Douglass, 14 Kan. 293; Hommell v. Devinney, 39 Mich. 522. But this presumption is limited to official acts: Murphy v. Chase, 103 Pa. 260. It will not be presumed that the officer is in default upon the presumption that the other party has performed his duty: Weimer v. Bunbury, 30 Mich. 201. Nor is the presumption a substitute for wholly independent and material facts having no necessary connection with such official acts: United States v. Ross, 92 U. S. 281, 23 L. Ed. 707. Nor is it effective when the officer acts under a naked statutory power with a view to divest the title or right of a citizen: Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Thatcher v. Powell, 6 Wheat. (U. S.) 119, 5 L. Ed. 221; Jackson v. Shepard, 7 Cow. (N. Y.)

88, 17 Am. Dec. 502; Sharp v. Johnson, 4 Hill (N. Y.), 92, 40 Am. Dec. 259; Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773; Martin v. Rushton, 42 Ala. 289; Nichols v. Bridgport, 23 Conn. 189, 60 Am. Dec. 636. See, also, Culp v. New York, 146 App. Div. 326, 130 N. Y. Supp. 705; State v. Spokane, 64 Wash. 388, 116 Pac. 878.

³⁵ Knox County v. Ninth National Bank, 147 U. S. 91, 37 L. Ed. 93, 13 Sup. Ct. Rep. 267; Felch v. Hodgman, 62 Ohio St. 317, 56 N. E. 1018; Stanley County v. Coler, 190 U. S. 437, 47 L. Ed. 1126, 23 Sup. Ct. Rep. 811. As to presumption of public appropriation, see Town of Ridgeway v. Treman, 72 Misc. Rep. 452, 129 N. Y. Supp. 1081.

³⁶ Bank of United States v. Dandridge, 25 U. S. (12 Wheat.) 64, 70, 6 L. Ed. 552, 554.

corporations were not actually mentioned, the fact of Mr. Justice Brewer utilizing the excerpt in a case dealing with municipal bonds will be sufficient warrant for its application here. In another important case,³⁷ the court held that it was not essential that every step leading up to the assemblage of a city council or connected with proceedings which were within the general powers conferred upon it should be shown with that degree of strictness which is required in tracing title to realty back to its fountain head. After citing the *omnia praesumuntur* maxim, the court said that when, many years after the passage of an ordinance, out of which substantial rights had grown, it is assailed upon similar grounds to that in the case then before the court, it will be assumed, if necessary, that the meeting attacked was a special one, and that absent trustees were duly advised thereof and of the matters to be then considered and passed upon. In an instructive Missouri case³⁸ the validity of a special tax bill was involved. The contract for the work required the approval of the city council. That body met in regular session July 8, 1881, and adjourned to meet "in a week from" that night. The next record of a meeting was of July 16, 1881, when the mayor and eight of the ten councilmen were present and transacted business, among which was the approval of the contract in question. The court said: "Nothing is stated regarding the cause of their assembling. It may have been upon special call of the mayor, or in supposed compliance with the adjournment of eight days before. It appears that regular municipal business was transacted and a record thereof was preserved in the usual way by the proper officer. In the absence, therefore, of any evidence to the contrary, it will be presumed that these public officers rightly acted in the premises and that the meeting was properly convened."³⁹

³⁷ *Town of Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350.

³⁸ *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249.

³⁹ In his last edition *Dillon, Mun. Corp.*, 5th ed., treats at length on the

presumption of corporate existence (§ 232), of incorporation under the general law (§ 231n.), of due appointing of officers (§ 393), of regularity of meeting (§§ 507n., 538), of regularity of adjournment (§ 535n.),

§ 47 (41). **Statutory presumptions of this class—Civil cases.**—Presumptions in favor of the regularity of official acts are frequently created by statute and, though it has been questioned, it is clearly within the province of the legislature. In civil cases, there can remain no doubt that it is within the power of the legislature to determine on which party the burden of proof shall rest, and, having made such determination, it may change it from time to time, and thus shift the burden as in its discretion shall seem proper. This result, instead of being accomplished by a formal declaration that such burden shall be assumed by one party rather than by the other, may be attained by declaring that evidence proving one fact shall of itself be *prima facie* evidence of another and entirely different fact, and, at least in civil cases, it does not appear to be necessary that there shall be any logical connection between the two facts, or that the fact presumed shall be a probable consequence of the fact proved.⁴⁰ Thus in the various jurisdictions statutes will be found providing that a tax deed duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings from the valuation of the lands by the assessor up to and including the execution of the deed. The rule upon this subject is as follows: If the legislature has prescribed any step to be taken which it might have omitted to prescribe without affecting the validity of the proceedings, then it may declare that the tax deed or the assessment-roll shall be conclusive evidence of the taking of such step, at the proper time and in the proper manner, though the roll may have been made in due form or the deed executed without such step being taken at all, and though neither the roll nor the deed affirms in direct terms that the step has been taken. Such a statute is constitutional, because it cannot, in any event, do more than deprive the party of the right to have something done which

of validity of ordinances (§ 649), of the validity of warrants (§ 855), of dedication from long user (§ 1080), and of municipal consent to

a railroad in street being presumed from long continued user (§ 1227).

⁴⁰ Gage v. Caraher, 125 Ill. 447, 17 N. E. 777.

has not been guaranteed to him by any provision of the constitution, and which the legislature might have in the first instance failed to require. Hence, if property has been assessed and equalized, and is subject to taxation, and taxes thereon have not been paid, the other steps required by statute to be taken may be regarded as directory merely, and the legislature may create a conclusive presumption of their existence.⁴¹ So statutes are frequently enacted providing that former acknowledgments of deeds, taken in other states of lands within the jurisdiction, shall be presumed to have been taken in conformity to law; and that orders of the proper officers laying out highways are presumptive evidence of notice and of regularity of former proceedings. Equally important illustrations of such legislation will be found in numerous statutes in the several states which provide that judicial sales shall be presumed to have been regular after the lapse of time, or after proof has been made of certain jurisdictional facts. The protest of any foreign or inland bill of exchange or promissory note certified by a notary public may be made legal evidence of the facts stated in such protest, and the statute giving it that effect is constitutional, and is not restricted to protests made before its enactment.⁴² A statute authorizing the appointment of an auditor in actions of account for the purpose of stating the account between the parties, and of making a report to the court, which report may, under the direction of the court, be given in evidence to the jury, may have the effect of changing the burden of proof, because the report must be assumed *prima facie* to be correct. The statute is nevertheless valid and free from constitutional objection.⁴³ These statutes are of special importance in supporting titles depending upon

⁴¹ Phelps v. Meade, 41 Iowa, 470; De Treville v. Smalls, 98 U. S. 525, 25 L. Ed. 174; Smith v. Cleveland, 17 Wis. 556; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Matter of Lake, 40 La. Ann. 142, 3 South. 479. To an exhaustive note to the case of People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N.

E. 759, we are indebted for the above useful extracts, and the reader is referred to the note for further information.

⁴² Fales v. Wadsworth, 23 Me. 553.

⁴³ Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Allen v. Hawks, 11 Pick. (Mass.) 359; Morgan v. Morse, 13 Gray (Mass.), 150.

proceedings in courts of probate. No attempt will be made to enumerate the statutes of the several states creating these and similar presumptions, but it is left with the practitioner to consult the statutes and decisions of the jurisdiction.^{43a}

§ 47a (41). **Same — Criminal cases.**—A statute may make the evidence of certain facts *prima facie* evidence of the commission of a crime, though the explanation of the facts from which the presumption arises is not peculiarly within the knowledge of the person accused. A statute providing that any junk-dealer or dealer in second-hand articles, having possession of certain kinds of bottles having on them the mark or name of a person, without his written consent, shall be presumed to be in the unlawful use, purchase, or traffic in such bottles, is not unconstitutional. Notwithstanding the presumption, the jury should refuse to convict unless satisfied from the whole evidence, beyond a reasonable doubt, of the guilt of the accused.⁴⁴ The difficulty of obtaining direct evidence of the violation of statutes forbidding or regulating the sale of intoxicating liquors has resulted in various enactments making the possession or delivery of such liquors *prima facie* evidence of their unlawful sale; and in some instances going still further, and making evidence of the reputation of the house as being one in which liquors were unlawfully sold *prima facie* evidence of the guilt of the person keeping it. These enactments have been generally sustained, though the cases to which they applied were criminal prosecutions.⁴⁵ There also exist statutes which provide that if any implements for gambling as usually used in gambling houses are found in any house, it shall be *prima facie* evidence that such house is kept for gambling, and that it shall be sufficient evidence that a house was rented for

^{43a} See notes, *Jackson v. Shepard*, 17 Am. Dec. 505; *People v. Cannon*, 36 Am. St. Rep. 682.

⁴⁴ *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759.

⁴⁵ *Board of Commrs. etc. v. Mer-*

chant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; *Edwards v. State*, 121 Ind. 450, 23 N. E. 277; *State v. Morgan*, 40 Conn. 44; *Lincoln v. Smith*, 27 Vt. 328; *State v. Cunningham*, 25 Conn. 195.

gaming, if gaming was carried on there and the owner or lessor had reason to believe that it was going on and took no steps to prevent it.⁴⁶ The cases already cited arising out of prosecutions for the unlawful sale of intoxicating liquors, or for keeping or renting places for the purpose of gambling therein, sufficiently establish that in criminal, as well as in civil, cases, the legislature may declare that the proof of certain facts shall be *prima facie* evidence of the existence of a crime or of some other act constituting an essential ingredient of a crime. So far as we are aware, there is no decision denying that this legislative power is as applicable to criminal prosecutions as to civil cases. The opinions in the criminal cases, however, are more cautiously expressed, and seem to imply that the power is not unlimited, and that the fact which is made *prima facie* evidence of some other fact to sustain a conviction must be one from which the existence of the latter may be reasonably inferred.⁴⁷

§ 48 (42). Presumptions of regularity in unofficial acts—**In general.**—So far we have dealt with presumptions of regularity in their application to official acts only. It will, however, already have suggested itself to the reader—from a reflection on the *fons et origo* of all established presumption—that since they rest on the results of human observation and experience, codified and classified in the great unwritten laws which grow with civilization, they must to a certain extent apply also to the transaction of business unconnected with official matters in their limited operation. Gradually the presumption that officials obey the mandates of the law and perform their duties has

⁴⁶ *Morgan v. State*, 117 Ind. 569, 19 N. E. 154. Other statutes have from time to time been passed creating a certain set of facts presumptive evidence, and there is no record of any harm or mischief to the community, but rather the benefit of readier conviction of the guilty; the innocent can always rebut the presumption.

⁴⁷ *Voght v. State*, 124 Ind. 358, 24

N. E. 680. In *Board of Commrs. etc. v. Merchant*, 103 N. Y. 143, 148, 57 Am. Rep. 705, 8 N. E. 484, it was said: "The general powers of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are."

been extended to include, to some extent, the acts of private persons as well, in the transaction of affairs of business. "He always did it this way" or "He never did it any other way" can easily be imagined as the foundation for consideration by the earliest tribunals for belief in the regularity of the one spoken of in acting or declining to act. Once that consideration was adopted—and in those days, as in ours, the greatest attention would be devoted to the utterances of the greatest judge—the news that one, the most learned of counselors, had ruled in such a way would be devoured with eagerness by other judges who were thus saved the expenditure of mental energy in deciding on a given set of circumstances, and satisfied themselves and the litigants with making their ruling harmonize with that of the proto-judge. The records of ancient times abound with such instances, and oriental literature teems with such expressions of opinion as "the learned pundit says" and "as was said by the rabbi," and these altogether apart from the "*stare decisis*" which the Romans used later. Hence, it is not difficult to trace the descent of our up-to-date presumptions. The interest of the student, however—if historical—will be increased, if he uses the knowledge thus acquired as a test to the question of the reasonableness of its application to the particular presumption which he has to support or attack. While the courts in the infinite variety of circumstances and combinations of circumstances brought before them have declared on almost every conceivable presumption, sometimes in the shape of a rule that regularity in business affairs shall be presumed in certain cases, sometimes that irregularity in those cases shall not be presumed, sometimes that legality is presumed, sometimes that illegality or fraud shall not be presumed,⁴⁸ the responsibility is always cast upon the painstaking student to consider the bearing of

⁴⁸ In re Darrow's Estate, 64 Misc. Rep. 224, 118 N. Y. Supp. 1082: "Where a situation is explainable on the basis of legality, it will be assumed that such is the explanation: 16 Cyc. 1083; Green v. Benham, 57

App. Div. 9, 68 N. Y. Supp. 248. Consequently, the result follows in judicial determinations that he who claims the existence of illegality must prove it: 16 Cyc. 1082, and cases there cited."

each and every presumption, whether in favor of order and regularity or against unusual or irregular action, on the subject he has under consideration. He must keep vigilant guard over the misconstruction of coincidence, as opposed to methodical repetition, as the foundation for the assumption he may seek to create or destroy, as the case may be. Courts have sanctioned the presumptions which will be mentioned in the following sections on the grounds that men are presumed to have acted legally and properly rather than otherwise, and that it is reasonable to assume that the usual and customary modes of business have been adopted in given cases, until some departure from the regular mode has been shown. But it is evident from the very statement of the considerations which have influenced the courts to adopt presumptions of this class that such presumptions are far from conclusive and that they must be received with caution; yet they have been applied to an infinite variety of cases, sometimes being entitled to considerable weight, in others to very little. Generally their chief importance is to determine the burden of evidence or the order of proof.

§ 49 (43). Same—As to negotiable paper.—After the advent into the commercial world of negotiable instruments, their regulation lay for a long time according to the canons of the law-merchant, which was part of the common law of England, and which was the unfailing guide for their interpretation. Certain rules became recognized as belonging peculiarly to the domain of bills of exchange and promissory notes and checks, and as order and punctuality and regularity of business action with regard to them influenced both their negotiability and recovery upon them, it is in the order of things that presumptions of regularity are perhaps the most frequently indulged in respect to negotiable paper. We have already pointed out⁴⁹ that in some states many of the satisfactory presumptions, that is to say, satisfactory until rebutted, have been enacted as substantive law, and in regard to nego-

⁴⁹ § 11b, *ante*.

tiable instruments four of such presumptions are in statutory force in code states.⁵⁰ It is presumed that such paper was regularly issued for a valuable consideration, and that the payee or the one who has purchased it before maturity is a *bona fide* holder and entitled to recover the full amount.⁵¹ The holder of such paper, other than the payee, is always fortified with the presumption in his favor that such paper was taken by him under due, in good faith and without notice of any infirmity attaching to it.⁵²

§ 49a (43). Same—As to negotiable paper—Bona fide ownership.—It is a well-established proposition that the mere possession of a negotiable instrument by the indorsee, or by the transferee, where no indorsement is necessary, imports *prima facie* that he is the lawful owner, and that he acquired it before maturity, *bona fide*, for value, in the usual course of business, and without notice of any circumstance impeaching its validity.⁵³ Nor is this pre-

⁵⁰ 1. That private transactions have been fair and regular. 2. That the ordinary course of business has been followed. 3. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration. 4. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill: Cal. Code Civ. Proc., § 1963.

⁵¹ Dickerson v. Burke, 25 Ga. 225; Wilson v. Lazier, 11 Gratt. (Va.) 477; Clark v. Schneider, 17 Mo. 295; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Commercial Bank of Danville v. Burgwyn, 108 N. C. 62, 25 Am. St. Rep. 49, 17 L. R. A. 326, 12 S. E. 952; S. C., 110 N. C. 267, 14 S. E. 623. There is a valuable note to the last-named case in 17 L. R. A., in which the burden of proof in an action on a negotiable instrument by the purchaser is discussed from the standpoint (1) of the presumption arising from possession, (2) the *onus* on the maker to rebut the presump-

tion, and (3) the circumstances which will rebut it.

⁵² See cases collected in note 17 L. R. A. 326. "The mere possession of a negotiable instrument produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports *prima facie* that he acquired it *bona fide* for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), *prima facie* establishes his case; and he may there rest it": 1 Daniell on Neg. Instrs., § 812, and the cases cited in note 89 thereto, in which the presumption is discussed at length.

⁵³ Note to Bailey v. Smith, 84 Am. Dec. 403; Murray v. Lardner, 2 Wall. (N. S.) 110, 17 L. Ed. 857; Carpen-

sumption overcome by evidence that the paper was executed without consideration between the original parties, or that the consideration has failed,⁵⁴ nor by the fact that the maker of a note paid the amount thereof to the original payee, without notice that it had been transferred.⁵⁵ The possession of a negotiable instrument, however, only authorizes a presumption of such rights and obligations of

ter v. Longan, 16 Wall. 271, 21 L. Ed. 313; Commissioners of Marion County v. Clark, 94 U. S. 278, 285, 24 L. Ed. 59; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; Brown v. Spofford, 95 U. S. 474, 478, 24 L. Ed. 508; In re Tallassee Mfg. Co., 64 Ala. 567; McCann v. Lewis, 9 Cal. 246; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Sperry v. Spaulding, 45 Cal. 544; Matthews v. Poythress, 4 Ga. 287, 305; Merchants' etc. Nat. Bank v. Trustees of Masonic Hall, 62 Ga. 271, 283; Pettis v. Westlake, 3 Scam. (Ill.) 535; Mobley v. Ryan, 14 Ill. 51, 56 Am. Dec. 488; Palmer v. Nassau Bank, 78 Ill. 380; Hall v. Allen, 37 Ind. 541, 542; Baldwin v. Fagan, 83 Ind. 447; Wilkinson v. Sargent, 9 Iowa, 521; Union Nat. Bank v. Barber, 56 Iowa, 559, 9 N. W. 890; Rahm v. King Wrought-iron Bridge Manufactory, 16 Kan. 530; Eeton v. Harlan, 20 Kan. 452; Taylor v. Bowles, 28 La. Ann. 294, 295; Baxter v. Ellis, 57 Me. 178; Totten v. Bucy, 57 Md. 446; Conley v. Winsor, 41 Mich. 253, 2 N. W. 31; Cummings v. Thompson, 18 Minn. 246; Craig v. City of Vicksburg, 31 Miss. 216; Emanuel v. White, 34 Miss. 56, 69 Am. Dec. 385; Winstead v. Davis, 40 Miss. 785; Harrison v. Pike, 48 Miss. 46; Horton v. Bayne, 52 Mo. 531; Johnson v. McMurry, 72 Mo. 278; Duncan v. Gilbert, 29 N. J. L. 521; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156; Case v. Mechanics' Banking Assn., 4 N. Y. 166; First Nat. Bank v. Green,

43 N. Y. 298; Ross v. Bedell, 5 Duer (N. Y.), 462, 467; French v. Barney, 1 Ired. (23 N. C.) 219; Pugh v. Grant, 86 N. C. 39; Treadwell v. Blount, 86 N. C. 33; Davis v. Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375; Knight v. Pugh, 4 Watts & S. 445, 39 Am. Dec. 99; Brown v. Street, 6 Watts & S. 221; Snyder v. Riley, 6 Pa. 164, 47 Am. Dec. 452; Atlas Bank v. Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219; Jones v. Westcott, 2 Brev. (S. C.) 166, 3 Am. Dec. 704; Blum v. Loggins, 53 Tex. 121; Duerson's Admr. v. Alsop, 27 Gratt. (Va.) 229, 248; Middleton v. BARNED, 4 Ex. 241.

⁵⁴ Elliecott v. Martin, 6 Md. 509, 61 Am. Dec. 327; Hinkley v. Fourth National Bank, 77 Ind. 475; Ross v. Bedell, 5 Duer (N. Y.), 462, 467; Albrecht v. Strimpler, 7 Pa. 476; Hutchinson v. Boggs, 28 Pa. 294; Gray's Admr. v. Bank of Kentucky, 29 Pa. 365, 367; Sloan v. Union Banking Co., 67 Pa. 470; Dingman v. Amsink, 77 Pa. 114; Wilson v. Lazier, 11 Gratt. (Va.) 477; Whittaker v. Edmunds, 1 Moody & R. 366; Batley v. Catterall, 1 Moody & R. 379; Jacob v. Hungate, 1 Moody & R. 445; Lacey v. Forrester, 2 Crompt. M. & R. 59; Mills v. Barber, 1 Mees. & W. 425; Fitch v. Jones, 5 El. & B. 238; but see Heath v. Sansom, 2 Barn. & Adol. 291, 109 Eng. Reprint, 1151; Simpson v. Clarke, 2 Crompt. M. & R. 342.

⁵⁵ Emanuel v. White, 34 Miss. 56, 69 Am. Dec. 385.

the several parties as are indicated by the paper itself.⁵⁶ It has been held in a state, where actions under the code are to be brought in the name of the real party in interest, that the possession of an unindorsed promissory note, not payable to bearer, also raises a presumption that the person producing it on the trial was the real and rightful owner, and entitled to the money due from the maker.⁵⁷

§ 49b. Same—Bank notes.—No presumption at all is raised against the holder of a bank bill by showing that it was stolen or fraudulently put into circulation. Lord Mansfield said⁵⁸ that bank notes “are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes . . . a bank note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as such; and it is necessary, for the purposes of commerce, that their currency should be established and secured.”⁵⁹

§ 49c. Same—Presumption of date of indorsement.—There is also a presumption that an indorsement, made by a payee or indorsee without date, was before maturity and that the holder acquired the note or bill before maturity; and in the absence of proof the indorsement will be presumed to have been at the time of execution of the note,⁶⁰

⁵⁶ Central Bank v. Hammett, 50 N. Y. 159.

⁵⁷ Jackson v. Love, 82 N. C. 405, 33 Am. Rep. 685. The case of Dorn v. Parsons, 56 Mo. 601, is apparently in conflict with this proposition. It was a case in which the note was not payable to bearer nor indorsed by the payee, and the record showed no proof of ownership by the holder who claimed on it in the probate court against the estate of the maker. See, also, Gibson v. Miller, 29 Mich. 355, 18 Am. Rep. 98. But the mere fact of possession raised the presumption

of ownership according to the weight of authority.

⁵⁸ Miller v. Race, 1 Burr. 452, 97 Eng. Reprint, 398.

⁵⁹ Worcester County Bank v. Dorchester etc. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; Wyer v. Dorchester etc. Bank, 11 Cush. (Mass.) 51, 59 Am. Dec. 137.

⁶⁰ Mobley v. Ryan, 14 Ill. 51, 56 Am. Dec. 488; Ranger v. Carey, 1 Met. (Mass.) 369; Pettis v. Westlake, 3 Scam. (Ill.) 535; McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305; New Orleans etc. v. Montgomery,

and at the place where the instrument is dated.⁶¹ This rule, however, does not apply to non-negotiable paper.⁶² If the time of the indorsement becomes material for the purpose of defense, it is incumbent on the maker to show that it was made after the maturity of the instrument, and thereby destroy the legal presumption.⁶³

§ 49d (43). Same—As to negotiable paper—Miscellaneous presumptions.—The presumptions treated are the most frequent to be met in general practice, but there remain several others of rarer occurrence. Thus it is presumed that a bill of exchange was accepted before maturity,⁶⁴ that the holder of a note payable to bearer is the owner,⁶⁵ that the drawee of a check knows the signature of the drawer,⁶⁶ that a note in the possession of the maker has been paid.⁶⁷ The rule is the same as to a note with the name torn off,⁶⁸ and as to a due-bill.⁶⁹ A settlement of accounts will be presumed from the making of a note,⁷⁰ and when several persons sign a note they will be presumed equally liable,⁷¹ but there is no presumption from the drawing of a check that it was in payment of a debt to the bank.⁷²

95 U. S. 16, 24 L. Ed. 346; *Cripps v. Davis*, 12 Mees. & W. 165; *Snyder v. Oatman*, 16 Ind. 265; *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600; *Mason v. Noonan*, 7 Wis. 609; *Colburn v. Averill*, 30 Me. 310, 1 Am. Rep. 630. In *Ruddell v. Landers*, 25 Ark. 238, 94 Am. Dec. 719, however, it was held that the date to be presumed should be that most advantageous to the maker.

⁶¹ *Lennig v. Ralston*, 23 Pa. 139.

⁶² *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

⁶³ *Mobley v. Ryan*, *supra*; *Pettis v. Westlake*, 3 Scam. (Ill.) 535.

⁶⁴ *Roberts v. Bethell*, 12 Com. B. 778 (for extended note as to liability of a stranger who indorses commercial paper before delivery, see 18 L. R. A. 33).

⁶⁵ *Stoddard v. Burton*, 41 Iowa, 582.

⁶⁶ *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190.

⁶⁷ *Gray v. Gray*, 2 Lans. (N. Y.) 173; *Hollenberg v. Lane*, 47 Ark. 394, 1 S. W. 687; *Callahan v. Bank*, 82 Ky. 231; *Tuskaloosa Oil Co. v. Perry*, 85 Ala. 158, 4 South. 635; *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959.

⁶⁸ *Powell v. Swan*, 5 Dana (Ky.), 1.

⁶⁹ *Tedens v. Schumers*, 112 Ill. 263.

⁷⁰ *Copeland v. Clark*, 2 Ala. 388; *Campbell v. Hays*, 1 Ind. 547; *De Freest v. Bloomingdale*, 5 Denio (N. Y.), 304.

⁷¹ *Orvis v. Newell*, 17 Conn. 97.

⁷² *White v. Ambler*, 8 N. Y. 170. See extended note to *Commercial Bank v. Burgwyn*, 17 L. R. A. 328.

§ 49e (43). Same—As to negotiable paper—Rebuttal of the presumption.—While the foregoing rule is well established, it is equally well settled that if the maker, acceptor, or other party bound by the original consideration of negotiable paper proves that there was fraud in the inception of the instrument, or circumstances raising a strong suspicion of fraud, the general presumption in favor of the holder is then overcome, and he is bound to show that he acquired the paper *bona fide*, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud.⁷³ The reason of this rule is the presumption that

⁷³ *Smith v. Sac County*, 11 Wall. (U. S.) 139, 20 L. Ed. 102; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 Id. 753, 761, 24 L. Ed. 170; *McClintick v. Cummins*, 2 McLean, 98, Fed. Cas. No. 8698; *Wallace v. Branch Bank at Mobile*, 1 Ala. 565; *Gilman v. New Orleans etc. R. R.*, 72 Ala. 566; *Sperry v. Spaulding*, 45 Cal. 544; *Matthews v. Poythress*, 4 Ga. 287, 305; *Merchants' etc. National Bank v. Trustees of Masonic Hall*, 62 Ga. 271, 283; *Harbison v. Bank of Indiana*, 28 Ind. 133, 92 Am. Dec. 308; *Mitchell v. Tomlinson*, 91 Ind. 167; *Blair v. Buser*, 1 Wils. (Ind.) 333; *Lane v. Krekle*, 22 Iowa, 399; *Terry v. Taylor*, 64 Iowa, 35, 19 N. W. 841; *Bank of Monroe v. Anderson Bros. Min. etc. Co.*, 65 Iowa, 692, 22 N. W. 929; *Morgan v. Yarrowborough*, 13 La. 74, 33 Am. Dec. 553; *Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242; *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273; *Ellicott v. Martin*, 6 Md. 509, 61 Am. Dec. 327; *Crampton v. Perkins*, 65 Md. 22, 3 Atl. 300; *Bissell v. Morgan*, 11 Cush. (Mass.) 198; *Tucker v. Morrill*, 1 Allen (Mass.), 528; *Smith v. Livingston*, 111 Miss. 342; *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192; *Wright v.*

Irwin, 33 Mich. 32; *Cummings v. Thompson*, 18 Minn. 246; *Horton v. Bayne*, 52 Mo. 531; *Hamilton v. Marks*, 63 Mo. 167; *Johnson v. McMurry*, 72 Mo. 278; *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449, 2 Morr. Min. Rep. 139; *Duncan v. Gilbert*, 29 N. J. L. 521; *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Case v. Mechanics' Banking Assn.*, 4 N. Y. 166; *Farmers' etc. Nat. Bank v. Noxon*, 45 N. Y. 762; *Ross v. Bedell*, 5 Duer (N. Y.), 462, 467; *Holme v. Karsper*, 5 Binn. (Pa.) 469; *Beltzhoover v. Blackstock*, 3 Watts (Pa.), 20, 26, 27 Am. Dec. 330; *Albrecht v. Strimpler*, 7 Pa. 476, 477; *Dingman v. Amsink*, 77 Pa. 114; *Pugh v. Grant*, 86 N. C. 39; *Davis v. Bartlett*, 12 Ohio St. 534, 80 Am. Dec. 375; *Knight v. Pugh*, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99; *Snyder v. Riley*, 6 Pa. 164, 47 Am. Dec. 452; *Blum v. Loggins*, 53 Tex. 121; *Vathir v. Zane*, 6 Gratt. (Va.) 246; *Wilson v. Lazier*, 11 Gratt. (Va.) 477; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Mills v. Barber*, 1 Mees. & W. 425; *Edmonds v. Groves*, 2 Mees. & W. 642; *Bailey v. Bidwell*, 13 Mees. & W. 73; *Wyat v. Bulmer*, 2 Esp. 538; *Smith v. Braine*, 16 Q. B. 244,

the guilty party transferred the paper merely that he might recover on it in the name of a third person. And this being the reason of the rule, it would seem to be plain that the fraud, to cast the *onus* on the holder, need not necessarily have been in procuring the execution of the paper, or in putting it in circulation, but that it might have been a fraud subsequently committed in obtaining possession of the paper from the defendant, if he is sought to be held liable thereon, or from the plaintiff, if he is seeking to assert his title to the paper, as the case might be.⁷⁴

§ 50 (44). Presumptions that documents have been duly executed.—There would indeed be little benefit in reducing the terms of any contract to writing, if the sole result of the operation were that such writing was to be merely a record of the transaction, which should require the same strictness of proof as the oral agreement. From time immemorial there were certain privileges as well as certain obligations attaching to the *littera scripta*.⁷⁵ Hence it is a rule of general application that documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity.

117 Eng. Reprint, 872; *Harvey v. Towers*, 6 Ex. 656; *Berry v. Alderman*, 14 Com. B. 95; *Mather v. Lord Maidstone*, 1 Com. B., N. S., 273; *Hall v. Featherstone*, 3 Hurl. & N. 284.

⁷⁴ See *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318; *Sloan v. Union Banking Co.*, 67 Pa. 470. But it would seem to be equally true, in the language of Chief Justice Dixon in *Kinney v. Kruse*, 28 Wis. 183, that "the fraudulent putting in circulation of a negotiable instrument, which operates to change the burden of proof, and call upon the plaintiff to prove his title as a *bona fide* holder, is where this is done fraudulently as to the defendant or maker, and not

where it is so done as to the payee or some intermediate holder or party to the paper." See, also, on the question of notice, *President etc. of Fulton Bank v. President etc. of Phoenix Bank*, 1 Hall (N. Y.), 562; and see *Hart v. Potter*, 4 Duer (N. Y.), 458, where it was held the plaintiff need only prove title, and not that he had no notice of the fraud.

⁷⁵ *Expressum facit cessare tacitum; vox emissa volat, littera scripta manet*, are law axioms, and law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages: *Bebee v. Bank of New York*, 1 Johns. (N. Y.) 529, 571, 3 Am. Dec. 353.

Where an attorney under power giving special directions as to the terms and conditions duly executed a conveyance in pursuance thereof, the rule applies that, if the deed is apparently within the scope of the power, the presumption obtains that the agent had performed his duty to his principal.⁷⁶ Subject to certain exceptions, the general rule is that the presumption in favor of the conveyance will be allowed to prevail in all cases where it was executed as a matter of duty, either by an agent or trustee, if the instrument is regular on its face.⁷⁷ Facts will not be presumed against a deed of conveyance which on its face has all the legal requisites to make it a valid instrument.⁷⁸ Instead of that, the rule is, that he who would invalidate such a deed must impeach it by affirmative proof.⁷⁹ Thus it will be presumed that the maker of an instrument executed it before the witness signed,⁸⁰ and that a document purporting to be witnessed was witnessed at the time of its execution.⁸¹ When different deeds and leases are made bearing date on the same day and the order of the execution does not appear, it will be presumed that they were made in the proper order and to carry out the obvious intent of the parties.⁸² But where the question of the date is in

⁷⁶ *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. Ed. 504. See, also, *Freeman v. Thayer*, 33 Me. 76; *Sadler v. Anderson*, 17 Tex. 245; *Diehl v. Emig*, 65 Pa. 320. As to notes and bills, see notes to *Commercial Bank v. Burgwyn*, 17 L. R. A. 326; *Fullerton v. Hill*, 18 L. R. A. 35.

⁷⁷ *Taylor on Ev.*, § 116.

⁷⁸ *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1037.

⁷⁹ *Polk v. Wendal*, 9 Cranch (U. S.), 87, 3 L. Ed. 665; *Bagnell v. Broderick*, 13 Pet. (U. S.) 450, 10 L. Ed. 235; *Minter v. Crommelin*, 18 How. (U. S.) 87, 15 L. Ed. 279; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 70, 6 L. Ed. 552. In the old case of *Pillow v. Roberts*, 13 How. (U. S.) 472, 14 L. Ed. 228 (also in 12 Ark. 322), will be found

an interesting illustration. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

⁸⁰ *Hughes v. Debnam*, 8 Jones (N. C.), 127.

⁸¹ *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

⁸² *Dudley v. Cadwell*, 19 Conn. 218; *Taylor v. Horde*, 1 Burr. 106, 97 Eng. Reprint, 190; *Barker v.*

issue, or any suspicion of fraud can be directed to its accuracy to the prejudice of any of the parties, then the presumption is nullified to the extent that evidence *dehors* must be adduced.⁸³ When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,⁸⁴ unless it be shown to have remained unstamped for some time after execution.⁸⁵ The rule is the same where secondary evidence is

Keete, 1 Freem. (K. B.) 250, 89 Eng. Reprint, 179; Steph. Ev., art. 85.

⁸³ From Reynolds' Stephen's Digest of Ev., p. 122, we extract article 85 of the original digest: "When any document bearing a date has been proved it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practiced, and would if practiced, injure any person, or defeat the objects of any law": 1 Ph. Ev. 482, 483; T. E. S. 137; Best, § 403; Smith v. Porter, 10 Gray (Mass.), 66, 68; Costigan v. Gould, 5 Denio (N. Y.), 290, 293; 2 Whart. on Ev., §§ 977, 988, 1312; Knowlton v. Culver, 2 Pinn. (Wis.) 243, 1 Chand. 214, 52 Am. Dec. 156; 1 Shep. Touchstone, 72; Cowen & Hill's Notes, p. 298. Stephen appends to article 85, *supra*, two illustrations founded on English cases: (a) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of

creditors whose claims date from the interval between the act of bankruptcy and the adjudication: Anderson v. Weston, 6 Bing. N. C. 302, 133 Eng. Reprint, 117; Sinclair v. Baggalay, 4 Mees. & W. 312. (b) In a petition for damages on the ground of adultery, letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against: Houliston v. Smyth, 2 Car. & P. 24.

⁸⁴ Closmadeuc v. Carrell, 18 Com. B. 36, 44, where the history of the rule is traced; Crisp v. Anderson, 1 Stark. 35. See note to Knox v. Rossi, 48 L. R. A. 309.

⁸⁵ Reynolds' Stephen's Digest of Ev., art. 86. From this useful work we take Mr. Reynolds' note that as to presumption regarding cancellation of stamp, see Rees v. Jackson, 64 Pa. 486, 493, 3 Am. Rep. 608, 5 Morr. Min. Rep. 615, and that absence of the stamp required by the United States revenue law does not render the document inadmissible in evidence in state courts: Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339; Thomas v. State, 40 Tex. Cr. 562, 76 Am. St. Rep. 740, 51 S. W. 242; Small v. Slocumb, 112 Ga. 279, 81 Am. St. Rep. 50, 53 L. R. A. 130, 37 S. E. 481.

given of a lost instrument,⁸⁶ or of notice of protest, the contents not being proved.⁸⁷ It is an application of the same principle that when a contract, which should be in writing under the statute of frauds, is declared to have been duly made, it will be presumed to be in writing.⁸⁸ And where a mortgage for purchase money was regular, it was presumed that a lost deed, executed in connection with it at the same time, was also regular.⁸⁹ On the same principle recitals in ancient documents of former documents have been held presumptive evidence of their existence.⁹⁰ And where an attested copy of a deed from its registry is introduced as evidence bearing a scroll and the word "seal" written upon it in a place where the seal is usually placed, it will be presumed that the original was properly sealed.⁹¹ And if a will purports to have been duly signed, attested and witnessed, on proof of execution the court will presume, in the case of the death of the witnesses, or in case they do not remember the facts connected with its execution, that the law was complied with,⁹² and the details of the statutory requirements will be presumed, whether it is so stated in the attestation clause or not, unless the contrary is proven.⁹³ In the case of a deed which is a voluntary settlement, the law presumes much more in favor of a delivery than it does in ordinary cases

⁸⁶ *Marine Investment Co. v. Havinside*, L. R. 5 H. L. Cas. 624; *Thayer v. Barney*, 12 Minn. 502. But where there is no evidence of loss, the court will not indulge in presumptions to excuse production. Presumptions must be based on necessity: *Skov v. Coffin* (Tex. Civ. App.), 137 S. W. 450.

⁸⁷ *Burgess v. Vreeland*, 4 Zab. (N. J. L.) 71, 59 Am. Dec. 408.

⁸⁸ *Printup v. Johnson*, 19 Ga. 75; *Coles v. Bowne*, 10 Paige Ch. (N. Y.), 526.

⁸⁹ *Godfroy v. Disbrow*, Walk. Ch. (Mich.) 260.

⁹⁰ *Fuller v. Saxton*, 20 N. J. L. 61.

⁹¹ *Deininger v. McConnel*, 41 Ill. 228.

⁹² *Burgayne v. Showler*, 1 Rob. Ecc. 5; *Brenchley v. Still*, 2 Rob. 162; *Thompson v. Hall*, 2 Rob. 426; *Reeves v. Lindsay*, L. R. 3 Eq. 509; *Hughes v. Hughes*, 31 Ala. 519; *Auburn Seminary v. Calhoren*, 25 N. Y. 422; *In re Gillmor's Will*, 117 Wis. 302, 94 N. W. 32. In *Croft v. Croft*, 4 Swab. & T. 10, the attesting witness denied the execution of the will.

⁹³ *Deupree v. Deupree*, 45 Ga. 415; *Fatheree v. Lawrence*, 33 Miss. 585; *Croft v. Pawlet*, 2 Str. 1109; *Eliot v. Eliot*, 10 Allen (Mass.), 357; *Barnes v. Barnes*, 66 Me. 286; *Chaffee v. Convention*, 10 Paige Ch. (N. Y.) 85, 40 Am. Dec. 225, and note; *Blocher v. Hostetter*, 2 Grant Cas. (Pa.) 288.

of deeds of bargain and sale, and this presumption is especially strong when the grantee is an infant. As to such a deed the presumption is in favor of delivery, and the burden of proof is on one claiming adversely to show that there was no delivery.⁹⁴ A deed made as a voluntary settlement may be effective to vest title in the grantee, although it is retained by the grantor in his possession until his death, if other circumstances do not show an intention contrary to that expressed on the face of the deed. The grantor may deliver the deed either to the grantee or to a stranger for his use, and an acceptance by the grantee will be presumed from the fact that the deed is for his benefit, especially if the grantee is an infant. If there are such contrary circumstances, the presumption in favor of delivery will be overcome.⁹⁵

§ 50a (44). Same — Delivery of deeds.—So where a deed is duly signed, attested and witnessed there arises a presumption of sealing and delivery,⁹⁶ and the time of its execution and delivery is presumed to be on the day of its date.⁹⁷ In like manner, delivery and acceptance and

⁹⁴ *Riegel v. Riegel*, 243 Ill. 626, 90 N. E. 1108; *Bryan v. Wash*, 2 Gilm. (7 Ill.) 557.

⁹⁵ *White v. Willard*, 232 Ill. 464, 83 N. E. 954; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792.

⁹⁶ *Ball v. Taylor*, 1 Car. & P. 417; *Hall v. Bainbridge*, 12 Q. B. 699; *Grellier v. Neale*, 1 Peake, 199; *Tulbat v. Hodson*, 7 Taunt. 251; *Smith v. Battens*, 1 Moo. & R. 341; *Hunt v. Massey*, 5 Barn. & Ad. 902; *Sinclair v. Baggalay*, 4 Mees. & W. 853. There is also a presumption of delivery from the fact of the grantor executing the deed in the presence of attesting witnesses: *Moore v. Hazleton*, 9 Allen (Mass.), 102; *Howe v. Howe*, 99 Mass. 98. See, also, *Devlin on Real Estate*, 3d ed., § 296, where the cases have been collected with infinite care and the text includes the following excerpt

from *Moore v. Hazleton*, *supra*: "When an instrument of conveyance is sealed and delivered, with the intention on the part of the grantor that it should operate immediately, and there is nothing to qualify the delivery but keeping the deed in the hands of the grantor, it is a valid and effectual deed, in law and equity, and execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer delivery." See, also, note, *Northern Pac. Ry. Co. v. Seattle*, 12 L. R. A., N. S., 1121.

⁹⁷ *Hardin v. Crate*, 78 Ill. 533; *Smiley v. Fries*, 104 Ill. 416. In the code states this presumption has been incorporated under the heading of disputable presumptions, "That a writing is truly dated." For a type of these, see *Cal. Code Civ. Proc.*, § 1963 (23). The fact that a deed is

knowledge of contents are presumed after due acknowledgment and recording.⁹⁸ Where the grantee has possession of the deed, there is always the presumption of its having been delivered, especially when there are circumstances surrounding which render the presumption of delivery consistent. Where a testator had disposed of his property by will, and subsequently conveyed it to his son, who recorded it immediately, and on the evening of the same day the testator destroyed the will, the court said that the fact that in the evening the deceased called for his will and destroyed it was a circumstance tending to show that he had made another disposition of his property, and when taken in connection with the circumstances attending the making and signing of the deed, indicated that he was of the opinion that the changed disposition

not acknowledged or recorded until after the grantee's death does not indicate that it was not delivered on the day of its date. At most it merely suggests a question in regard to it. The date of a deed is *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later day: Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; Smith v. Porter, 10 Gray (Mass.), 66; People v. Snyder, 41 N. Y. 397; Harman v. Oberdorfer, 33 Gratt. (Va.) 497; Deininger v. McConnel, 41 Ill. 227; Ford v. Gregory, 10 B. Mon. (Ky.) 175; Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438. In Smiths v. Shoemaker, 17 Wall. (U. S.) 630, 21 L. Ed. 717, in refusing to treat a letter on the same basis as a deed, Mr. Justice Miller said: "The date found in the letter itself is relied on to show that it was written about the time possession was taken, and, perhaps, if the other essential requisites were proven, the time would be near enough to let it go to the jury. But it is obvious that as the date is only proved by the letter, the

fact that the letter was written and received must be proved before the date can be used to justify the admission of the letter. Many authorities are cited to show that, while the date found in an instrument may be disputed or disproved by other evidence, it is *prima facie* to be taken as the true date. All these cases, however, have reference to the case of an instrument which has been admitted in evidence on other and sufficient ground, and where the true date has become important on some other issue than the admission of the letter. It is a most vicious example of reasoning in a circle to admit the letter to prove the time when it was written, and assume this to be the real date for the purpose of admitting the letter." See, also, notes, Lee v. Fletcher, 12 L. R. A. 176; Munro v. Bowles, 54 L. R. A. 884.

⁹⁸ Warren v. President, 15 Ill. 236, 58 Am. Dec. 610; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478.

had been made effective.⁹⁹ Suspicious circumstances alone will not destroy the presumption which is strong enough to call for clear and convincing rebuttal.¹⁰⁰ But while the presumption is strong, it is not conclusive, and parol evidence is admissible to show nondelivery.¹ The recordation of a deed *a fortiori* affords the presumption of delivery, and it has been so steadily held. Lamm, P. J., in a concentrated opinion on the subject,² says: "Indeed it is evidence of a most cogent character tending to show delivery, for it is tantamount to a public proclamation by the grantor at a public place, intended for the world to act upon, that the grantor had in apt and due form transferred his title (and thereby his land) to another";³ and it has been held that the mere lodgment of the deed for recordation created the presumption of delivery.⁴

⁹⁹ *Nelson v. Wickham*, 86 Neb. 46, 124 N. W. 908; *Wilson v. Wilson*, 85 Neb. 167, 122 N. W. 856.

¹⁰⁰ *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946; *Tunison v. Chamblin*, 88 Ill. 379; *Richmond v. Morford*, 4 Wash. 338, 30 Pac. 241, 31 Pac. 513; 1 *Devlin on Deeds*, 3d ed., § 294.

¹ *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939. See, also, *Devlin on Real Estate*, 3d ed., §§ 294, 295, with the fine collection of cases there noted. The sections of *Devlin's* work referred to were quoted in the California case.

² *Chambers v. Chambers*, 227 Mo. 262, 137 Am. St. Rep. 567, 127 S. W. 86.

³ *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997. In *Chambers v. Chambers*, *supra*, the learned judge further said: The effect of our registry act is to make the record of a deed take the place of the significant common-law ceremony of livery of seisin. It is a solemn proclamation to the world, of which the world must take notice,

that there has been a transfer of title from the grantor to the grantee, precisely as in olden times there was a symbolical public transfer by delivery of a twig, clod, or a key. Such was the early holding in this state: *Perry v. Price*, 1 Mo. 555. Says Chief Justice McGirk in that case. "But livery of seisin is to be supplied by registry. . . . Here [referring to the registry act] the object of livery of seisin is more largely and completely effected than could be done by livery itself. The law goes for substance," etc. To the same effect is *Burke v. Adams*, 80 Mo. 512, 50 Am. Rep. 510.

⁴ *Atkins v. Globe Bank & Trust Co. (Ky.)*, 124 S. W. 879. In that case the court thus expressed itself: "We are of the opinion that the lodging of the deed for record in the proper office by the grantor was sufficient to constitute a delivery as of that date. The general rule is that a deed does not become operative until it has been delivered and accepted, or the grantee does some act equivalent to an acceptance of it. But if the grantees, or any of

§ 51 (45). **Dates—When presumed correct.**—There is always a presumption that instruments were made on the day they bear date, or, in the code language, that writings are truly dated; and it is on the same principle, as has been treated in the preceding two sections, that dates in written instruments are presumed to be correct, and that such instruments are presumed to have been executed at the time indicated by the date they bear. It is doubtless true that in the great majority of cases the date of the instrument and the time of its execution are the same, hence the inference may be fairly drawn until the contrary is proven. Where a deed appeared regular on its face, the fact that the certificate of the clerk to the deed was of subsequent date to that of the deed itself was held to be perfectly consistent with good faith; and although an attachment was levied between the two dates, the fact of the later date of the certificate was held at most to give rise to a mere surmise, of little weight in overcoming the presumption that the deed was made on the earlier date.⁵ But it has been held that the rule does not apply when a deed is offered to support an action against one who is neither a party nor privy to it;⁶ and in respect to forged instruments there is no presumption of delivery on the day of the date or at any particular time.⁷ Nor does it apply where it is apparent that there was a motive for collusion or fraud.⁸ So far as deeds are thus presumed to have been delivered at their date, there is no question of the rule.⁹

them, are infants, and the deed is beneficial to them, it will be presumed they assented to it, and its acceptance by them will date from the time it is delivered to the clerk for record or placed in the hands of a third person to be delivered or recorded." See, also, *Muntz v. Whitcomb*, 40 Pa. Super. Ct. 553.

⁵ *McFarlane v. Loudon*, *infra*, in which this section was cited. See, also, *People v. Warden of City Prison*, 135 N. Y. Supp. 841.

⁶ *Baker v. Blackburn*, 5 Ala. 417. See, also, *Potez v. Glossop*, 2 Ex. 191.

⁷ *Remington Co. v. O'Dougherty*, 81 N. Y. 474.

⁸ *Hoare v. Coryton*, 4 Taunt. 560; *Wright v. Lainson*, 2 Mees. & W. 733. The contrary has been held in *Sinclair v. Baggalay*, 4 Mees. & W. 312; *Taylor v. Kinloch*, 1 Stark. 175.

⁹ *Smith v. Porter*, 10 Gray (Mass.), 66; *Costigan v. Gould*, 5 Denio (N. Y.), 290; *People v. Snyder*, 41 N. Y. 397; *Biglow v. Biglow*, 39 App. Div. 103, 56 N. Y. Supp. 794; *Hall v. Conklin*, 138 App. Div. 450, 122 N. Y. Supp. 967; *Pullen v. Hutchinson*, 25 Me. 242; *McFarland*

It has been applied also to the assignment of a note where the defendant in an action pleaded by unverified answer that the assignment to the plaintiff was after action brought, but offered no evidence to rebut the presumption that the transfer was of the date it bore;¹⁰ it has been used with reference to the recordation of mortgages of personalty;¹¹ to an abstract of title to lands, the original deeds having been destroyed in the great fire at Chicago in 1871;¹² to a power of attorney;¹³ in regard to receipts for payments;¹⁴ to notes, bills, and indorsements;¹⁵ to letters;¹⁶ to agreements;¹⁷ and to legal processes.¹⁸ But although dates in written instruments are presumed correct, they do not afford any presumption of the truth of collateral facts, as of the presence of the alleged signers at the time and place the instrument purports to have been made.¹⁹ Like all other disputable presumptions, it is rebuttable. In an Illinois case,²⁰ a letter alleged to be written in 1901, during the Boer war, was admitted in evidence as having

v. Loudon, 99 Wis. 620, 67 Am. St. Rep. 883, 75 N. W. 394; Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; State v. Dana, 59 Wash. 30, 109 Pac. 191.

¹⁰ Byrd v. Tucker, 3 Ark. 451.

¹¹ Merrill v. Dawson, Hempst. (U. S.) 563, Fed. Cas. No. 9469. (The recorder certified on an original mortgage where and when it was recorded. The record did not show on what day it was recorded, "but that is not material nor can the certificate of the registering office be contradicted.")

¹² Chicago & A. R. Co. v. Keegan, 152 Ill. 413, 39 N. E. 33.

¹³ Dodge v. Hopkins, 14 Wis. 630.

¹⁴ Caldwell v. Gamble, 4 Watts (Pa.), 292. As to letters, see Dowie, v. Sutton, 126 Ill. App. 47.

¹⁵ Knisely v. Sampson, 100 Ill. 573; Claridge v. Klett, 15 Pa. 255; Taylor v. Snyder, 3 Denio (N. Y.), 145, 45 Am. Dec. 457; People v. Campbell, 160 Mich. 103, 13 Am. St. Rep. 417, 125 N. W. 42 (forgery of

a note which was presumed as of the date it bore).

¹⁶ Anderson v. Weston, 6 Bing. N. C. 296; Pullen v. Hutchinson, 25 Me. 249; Breck v. Cole, 4 Sandf. (N. Y.) 79; Smiths v. Shoemaker, 17 Wall. (U. S.) 630, 24 L. Ed. 717. See, also, the interesting case of Butler v. Mountgarret, 7 H. L. Cas. 647, 11 Eng. Reprint, 252.

¹⁷ Sinclair v. Baggalay, 4 Mees. & W., 312.

¹⁸ Day v. Lamb, 7 Vt. 426; Lyle v. Bradford, 7 T. B. Mon. (Ky.) 111; Bunker v. Shed, 8 Met. (Mass.) 150. See, also, instances and cases collected in Am. & Eng. Ency. of Law, 729, tit. "Date."

¹⁹ Given v. Albert, 5 Watts & S. (Pa.) 333. See note in Crabtree v. Crabtree, 15 Ann. Cas. 151, on the presumption when dates of delivery and certificate of acknowledgment differ.

²⁰ Dowie v. Sutton, 126 Ill. App. 47.

been written on October 29, 1901. The date at the head of the letter was "Oct. 29, '91," and if of that date was useless for the purpose for which it was tendered. It was submitted that the presumption was that it was written as of its date and too long before the matters in issue to be material. The court in disposing of the suggestion said: "There is no reason whatever for any such inference. The figures at the top of the letter, while affording a presumption of the date, by no means make it conclusive. When, as in this case, it is plain to a man of common sense that the letter was written at Cape Town while a war was going on, by a man who was in Cape Town, on the journey he speaks of in the letter, about Oct. 29, 1901, it becomes also plain to him that the date '91 was a clerical error for 1901. There was no error in admitting the letter in evidence."

§ 52 (46). **Presumptions as to the mailing and receipt of letters.**—Perhaps no more necessary presumption exists or was ever framed than that which the exigency of the proof of business communications called forth. To prove by strict legal method the dispatch of a letter mailed in the ordinary course would be a practical impossibility. The sender would have to stop at the fact that having affixed the proper postage stamp and correctly addressed the envelope containing his letter, he dropped it into a receptacle at the postoffice. What became of it then he could not truthfully testify. Further proof of the receipt of a letter than what is derived from proof of the proper direction and mailing of it would be wholly unnecessary, always difficult, and often impossible.²¹ As presumptions have always been created to meet a required convenience so soon as the circumstances had been sufficiently observed and experienced to warrant a reasonable conclusion as to their bearing and effect, so with the increase of postal business when it is shown that a letter has been deposited in the postoffice properly stamped and addressed correctly, and to the true place of residence of the person to whom

²¹ Russell v. Buckley, 4 R. I. 525, 70 Am. Dec. 167.

it is sent, it will be presumed that he received it in the due course of mail. The presumption is based on the fact that the postoffice is a public agency, charged with the duty of transmitting letters, and on the assumption that, what ordinarily results from the transmission of a letter through the postoffice, probably resulted in the given case. The known difficulty of making strict proof of facts of this character has no doubt also influenced the courts in holding that such a presumption exists.²² The delivery

²² *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Briggs v. Hervey*, 130 Mass. 186; *Breed v. Central City Bank*, 6 Colo. 235; *Sherwin v. National Cash Register Co.*, 5 Colo. App. 162, 38 Pac. 392; *Stocken v. Collin*, 7 Mees. & W. 515; *Dunlop v. Higgins*, 1 H. L. Cas. 381, 9 Eng. Reprint, 805; *Starr v. Torrey*, 22 N. J. L. 190; *Shoemaker v. Bank*, 59 Pa. 79, 98 Am. Dec. 315; *German National Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; *Planters' Mut. Ins. Assn. v. Green*, 70 Ark. 305, 80 S. W. 151; *Wilson v. Ford*, 190 Ill. 626, 60 N. E. 876; *Angusta v. Vienna*, 21 Me. 298; *National Acc. Assn. v. Burr*, 57 Neb. 437, 77 N. W. 1098; *Small v. Town of Prentice*, 102 Wis. 256, 78 N. W. 415; *Davidson S. S. Co. v. United States*, 142 Fed. 315, 73 C. C. A. 425; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 35 L. Ed. 332, 11 Sup. Ct. Rep. 691. See, also, *Phelan v. Northwestern Life Insurance Co.*, 113 N. Y. 147, 10 Am. St. Rep. 441, 20 N. E. 827, and note. By addressed correctly or accurately is meant that the envelope bear the name of the sendee, his place of residence with sufficient particularity to enable the deliverer of the letter to find it, the name of the city, town or village wherein the postoffice is located at which he

would usually receive or send away his letters, to which may be added the name of the state in which such postoffice has been established. Although the cases do not go quite the length of these particulars, it will be found that they substantially call for them: *Goodwin v. Prov. Sav. Life Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L. R. A. 473, 66 N. W. 157; *Henderson v. Carbondale Coal Co.*, 140 U. S. 25, 35 L. Ed. 332, 11 Sup. Ct. Rep. 691; *Russell v. Buckley*, 4 R. I. 525, 70 Am. Dec. 167; *Fleming & Ayerst Co. v. Evans*, 9 Kan. App. 858, 61 Pac. 503 (although the sender knew the street and number of the sendee's residence, he addressed his envelope "Chicago, Ill.," and under such circumstances no presumption arose that the sendee received it); *Chicago, R. I. & P. R. Co. v. Chickasha Nat. Bank*, 174 Fed. 923, 98 C. C. A. 535 (letter addressed merely "St. Louis Missouri"); *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.), 26 S. W. 280; 2 Whart. on Ev., § 1323. If the sender has been in the habit of receiving his mail from two postoffices, addressing him at either is sufficient: *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445; *United States Bank v. Carneal*, 2 Pet. (U. S.) 543, 7 L. Ed. 513. As to using the official name of an officer of a corporation or the proper firm name of a part-

may be at the postoffice or at another depository from which the proof shows the letters to be regularly delivered, or it may be to a clerk whose regular business it is to deliver such letters, the essential fact being that such a regular general course of business is established that the inference sought may be fairly drawn in the special case.²³ The rule has been applied even in cases where money was sent in the letter addressed.²⁴ But in other cases the con-

nership, see *Henderson v. Carbon-dale Coal Co.*, *supra*; *United States Nat. Bank v. Burton*, 58 Vt. 426, 3 Atl. 756; *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299. See, also, cases collected in 9 Ency. of Ev., p. 897. For rebuttal of this presumption, see note to *Merchants' Exchange Co. v. Sanders*, 4 Ann. Cas. 956. See, also, the late cases: *Cassell v. Randall*, 10 Ga. App. 587, 73 S. E. 858; *Covell v. Western Union Tel. Co.*, 164 Mo. App. 630, 147 S. W. 555; *City of Omaha v. Yancey*, 91 Neb. 261, 135 N. W. 1044.

²³ *Macgregor v. Kelley*, 3 Ex. 794; *Skilbeck v. Garbett*, 7 Q. B. 846, 115 Eng. Reprint, 706; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Thalhimer v. Brinckerhoff*, 6 Cow. (N. Y.) 90; *Hagedorn v. Reid*, 3 Camp. 377. In *Hetherington v. Kemp*, 4 Camp. 193, the letter was left on an office table for mailing. The presumption also arises when the letter is mailed at the train by being handed to a United States mail agent: *Watson v. Richardson*, 110 Iowa, 698, 80 Am. St. Rep. 331, 80 N. W. 416. By proper postage is meant the proper amount required by the government to be affixed or impressed in stamps to carry the matter mailed to its destination, or, in the words of *Bankers' Mut. Casualty Co. v. People's Bank*, 127 Ga. 326, 56 S. E. 429, "the presumption that a letter or parcel has reached its destination ought not to arise until it affirma-

tively appears that that which the postal authorities require to insure carriage and regularity has been done." See, also, cases collected in 22 Am. & Eng. Ency., tit. "Presumptions," 1255; 9 Ency. of Ev., "Presumptions," 897-900. By "mailed" is meant deposited in the mail: *Best v. German Ins. Co.*, 68 Mo. App. 598; and an allegation that a letter was "mailed" will raise the presumption that the law was complied with and that it was duly stamped: *Phenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453; *Brooks v. Day*, 11 Iowa, 46. Handing a letter to a mail agent on a railway train is mailing it: *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407; or dropping it into the receptacle provided by the postal authorities on the street: *Casco Nat. Bank v. Shaw*, 79 Me. 376, 1 Am. St. Rep. 319, 10 Atl. 67. The postmark on an envelope will frequently convey sufficient information to aid a presumption of due posting: *United States v. Noelke*, 17 Blatchf. (U. S.) 554, 1 Fed. 426; *United States v. Williams*, 3 Fed. 484; but it does not always carry that presumption, inasmuch as a letter posted one day might not be postmarked till the next day: *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445.

²⁴ *Russell v. Buckley*, 4 R. I. 525, 70 Am. Dec. 167; *Sutton v. Corning*, 69 N. Y. Supp. 670, 59 App. Div. 589.

trary rule has been applied.²⁵ Where a letter is received purporting to be an answer to the one which has been duly mailed to a person at his place of residence, this fact creates a presumption that the answer is genuine.²⁶ The presumption or inference that letters have been sent from a private office may arise when it is shown by the testimony of a clerk or otherwise that it is the regular practice to carry the letters to the postoffice or to mail them in a certain manner. After such proof the presumption of the mailing arises, although the witness has no recollection that in the given case the letter was mailed.²⁷

§ 53 (47). Same—Telegrams—Weight of the presumption.—Resting on a similar foundation to that which forms the basis for the presumption as to letters—the public convenience, the impossibility of absolute proof of transmission of a telegraphic message—the courts have constructed the presumption that, on the data of a message with the same precautionary measures as to address which apply to letters, duly delivered for transmission with the charges prepaid where required, the telegraphic message reached its proper destination.²⁸ A presumption of deliv-

²⁵ *Crane v. Pratt*, 12 Gray (Mass.), 348; *First Nat. Bank v. McManigle*, 69 Pa. 156, 8 Am. Rep. 236.

²⁶ *Walter v. Haynes, Ryan & M.* 149; *Connecticut v. Bradish*, 14 Mass. 296. The address must be substantially correct in order to create this presumption: See above cases; and there should be proof of the place of mailing and the course of the mail: *Boon v. State Ins. Co.*, 37 Minn. 426, 34 N. W. 902; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, 19 L. Ed. 885; *Phelan v. Northwestern Life Ins. Co.*, 113 N. Y. 147, 10 Am. St. Rep. 441, 20 N. E. 827, and note. See, also, note to *American Bonding Co. v. Ensey*, 11 Ann. Cas. 887. While it is well settled that where it is shown that a letter was addressed, stamped, and mailed, there is a presumption that it was received by the addressee,

it cannot be that the receipt of a letter purporting to be signed by a person is any evidence that it was written by such person: *Beard v. Southern R. Co.*, 143 N. C. 136, 55 S. E. 505.

²⁷ See § 53, *post*.

²⁸ *Commonwealth v. Jeffries*, 7 Allen (Mass.), 548, 83 Am. Dec. 712; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; *Perry v. German-Am. Bank*, 53 Neb. 89, 68 Am. St. Rep. 583, 73 N. W. 358; *Howley v. Whipple*, 48 N. H. 488. The last-named case has been cited in conflict with the weight of authority, but a perusal of it will disclose that it turned on the difference in principle between a letter received in reply to a written communication and a dispatch received in re-

ery results from intrusting to a telegraph company for transmission a telegram properly addressed in the same manner as that which follows the posting of a letter duly stamped and addressed for transmission by means of the United States mail. This presumption results not only from the manner in which telegraph companies conduct

ply to a telegraphic message. From the opinion we take the following: "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the original. The original message, whatever it may be, must be produced, it being the best evidence; and in case of its loss, or of inability to produce it from any other cause, the next best evidence the nature of the case will admit of must be furnished. If there was a copy of the message existing, it should be produced; if not, then the contents of the message should be shown by parol testimony: Scott and Jarnagin on Telegraphs, §§ 340, 341. Many cases are cited in the above work from which it is held, that in all controversies between the sender of the message, and the company, the original message is the one left at the office by the party sending it; but where a man sends a proposition to another man by telegraph and gets a reply accepting the offer, the original message, so far as binding the acceptor is concerned, is the copy delivered to him at the other end. The message as communicated to the acceptor and his reply as delivered to the operator to be returned, are what would govern in construing the contract, provided both parties voluntarily and of their own accord

sent their messages by the telegraph and thus adopted the company as their agent. So when a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the statute of frauds; because each party authorizes his agents, the company or the company's operator, to write for him; and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office. . . . We know that by the admirable system regulating the government of the telegraphic companies, the original dispatch is preserved and may be at all times procured for the proper purposes. The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy. If the dispatch is sought to be used in evidence the original must be produced and its execution proved

their business respecting the certainty of delivery, but also by reason of the relation of the telegraph company to the public, which is that of a public carrier of intelligence with rights and duties analogous to those of a carrier of goods and passengers.²⁹ The presumption that a telegram has been delivered in the regular course of business to the person to whom it was directed is one of fact, subject, of course, to be disproved.³⁰ One of the considerations which have been urged in favor of the presumption as to the due receipt of letters is the fact that the postoffice is managed by sworn government officers who are in the discharge of public duties.³¹ While this is not true of the officials and agents of telegraph companies, those companies are regulated in their business by public law, and severe penalties are frequently imposed for abuse of the confidence, and doubtless the instances in which messages properly directed and intrusted to the care are not delivered are comparatively rare. Upon considerations of this kind the

precisely as any other instrument, or its absence accounted for in the same mode, before the copy can be received. Whilst we know that the operators employed by the company are unusually accurate and reliable in the mode of doing business, still they do not act under the sanction of an oath, and even if they did, a copy coming from the office where delivered must be proved to be a true and compared copy, before it can be admitted in a proper case. For these reasons we are clearly of opinion that the court below erred in admitting this dispatch without the requisite preliminary proof." There is also an authority cited in Scott and Jarnagin, *supra*, from the 18th Upper Canada Rep. (Q. B.) 60, Kinghorn v. The Montreal Telegraph Co., where Robinson, C. J., in delivering the opinion of the court, says: "We must look, I think, in the case of each communication, at the papers delivered by the party who sent the message, not at the transcript of the message taken through the wire

at the other end of the line, with all the chances of mistake in apprehending and writing the signals, and in transcribing for delivery." As to proof of telegrams, see § 210, *post*. In 110 Am. St. Rep. 742, there is an encyclopedic note by the late A. C. Freeman, appended to the case of Cobb v. Glenn Boom & Lumber Co., 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005, dealing with contracts by telegraph and the admissibility of telegrams as evidence, which deals with the subject in all its phases.

²⁹ State v. Gritzner, 134 Mo. 512, 36 S. W. 39; Perry v. German-American Bank, 53 Neb. 89, 68 Am. St. Rep. 593, 73 N. W. 358; Western Twine Co. v. Wright, 11 S. D. 521, 44 L. R. A. 438, 78 N. W. 942.

³⁰ Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

³¹ Oregon Steamship Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485.

all-important opinion of Finch, J., of the court of appeals in New York throws a clear light.³² In answer to the self-put question, "Does a similar presumption of fact follow the delivery of a message properly addressed to the telegraph company for transmission, to that which follows the delivery of a letter to the postoffice?" the learned judge says that the drift of authority gives an affirmative answer.³³ The presumption indulged is one of fact, and so open to rebuttal and contradiction, and consists merely in the natural inference which may be drawn from the experienced certainty of transmission. The great bulk of letters sent by mail reach their destination, and equally so the great bulk of telegrams. A failure in either case is an exception, possible, but rare. The letters are transported by government officials acting under oath, and upon a system framed to secure regularity and precision; the telegrams by private corporations, whose success and prosperity depend largely upon the promptness and accuracy of the work, and are faithful under the incentive of interest. These companies perform a public service and are regulated to some extent by the public law.³⁴ There is thus impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmis-

³² *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485.

³³ *Gray on Telegraphs*, § 136; *Commonwealth v. Jeffries*, 7 Allen (Mass.), 548, 83 Am. Dec. 712; *Whart. on Ev.*, § 76; *State v. Hopkins*, 50 Vt. 316; *Scott and Jarnagin on Telegraphs*, § 345.

³⁴ They are authorized to cross with their wires any waters within the limits of the state (Laws 1845, c. 243); to construct their lines along and upon the public roads and highways (Laws 1848, c. 265); and upon and over the lands of individuals, paying the agreed

or appraised compensation therefor (Laws 1853, c. 471); injury to their lines is made a misdemeanor (Laws 1870, c. 491); the companies are required to transmit all dispatches in the order of their receipt; to accept and forward them from connecting lines; the operators are exempt from military service and jury duty (Laws 1861, c. 215); and it is made a misdemeanor for any employee to divulge the nature or contents of a private telegram, or willfully refuse or neglect to transmit or deliver the same (Laws 1867, c. 871): *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485.

sion by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind with that raised upon delivery to the postoffice, should be deemed weaker in degree, but in view of the wide extension of telegraph facilities, and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, we think it should be held that upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence, or where he is shown to have been, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and raise an issue to be determined. The weight to be given to the presumption now under discussion will, of course, depend very much upon the preliminary proof which may be given as to the course of business. The business of a public officer may be so systematically conducted that very considerable weight should be given to the presumption; on the other hand, it may be so carelessly managed that any presumption of regularity must be very unsatisfactory and very easily rebutted. The presumption as to a reply telegram is the same as with regard to letters, subject, of course, to rebuttal.³⁵

³⁵ *Western Twine Co. v. Wright*, 11 S. D. 521, 44 L. R. A. 438, 78 N. W. 942, in which the court said: "Unquestioned as it is, the presumption that the first message was transmitted to, and received by, appellant stands as ample proof of the fact, and if the purported reply was not sent by some one having authority to enter into a contract on its behalf, the matter was peculiarly within its knowledge, and might easily have been shown. Unless forgery by someone or fraud upon the part of the telegraph company is to be presumed, the delivery of the message to respondent at Rowena by its operator is a proper circumstance, tending strongly to show that on the very day respondent, F. R. Wright,

sent his message to Chicago, appellant placed its reply thereto in transit over the wires: *Scott & J. Tel.*, par. 380. Were a doctrine to prevail contrary to that which applies to a letter in the hands of its recipient, and which purports to be an answer to one he has written, and which was received by the party addressed, an agency by which the most important of human affairs are constantly transacted would be seriously impaired, and a distinction would be made to exist without a material difference." See, also, *Perry v. German-American Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593; *Commonwealth v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; 2 Wharton on Evidence, par.

§ 53a (47). **Same — Telephones.**—The experience and observation which form the embryo presumption are yet too immature to warrant the declaration of a set of rules for guidance in connection with the telephone. The result is not to be deprecated, for their promulgation will need to be carefully watched to prevent the overlapping of the presumption of identity both of person and voice. So far the decisions have dealt more with the reply by telephone than with the original message. Those who install telephones in their places of business in connection with a telephone exchange, and use them for business purposes, impliedly invite the business world to use that means of communicating with them with respect to the business there carried on; and the presumption is that they authorize communications made over the telephone in ordinary business transactions. The decisions are not in accord, but the weight of reason and authority is in favor of the presumption.³⁶ The reason is the same as that for the presumption that a business letter, properly directed, and sent by mail, reaches the business office of the addressee, and is opened by him or his authorized agent. The presumption that the person who answers is authorized to speak may be very slight or strong, according to the circumstances, but the statements of such persons should be admitted in evidence as *prima facie* the statements of one having authority to speak. It is important to observe that the presumption extends only to communications relating to the usual business carried on at the place from which the telephone communication comes. To illustrate the rule

1323; *Croswell on Electricity*, par. 674; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485.

³⁶ *Gen. Hosp. Co. v. New Haven etc. Co.*, 79 Conn. 581, 118 Am. St. Rep. 173, and note, 9 Ann. Cas. 168, 65 Atl. 1065; note, 6 L. R. A., N. S., 1180; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 116 Am. St. Rep. 172, and note, 8 Ann. Cas. 447, 80 N. E. 407; *Wolfe v. Missouri Pac. Ry. Co.*,

97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; 3 *Wigmore on Ev.*, § 2155; *Reed v. Railway*, 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 451; *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428, 17 L. R. A. 440, 52 N. W. 718; *Lenox v. Harrison*, 88 Mo. 496; *State v. Bank*, 120 Mo. 161, 25 S. W. 372; *Guest v. Hannibal & St. J. R. Co.*, 77 Mo. App. 258.

and the limitation: There is a presumption that a communication purporting to come from a local railroad freight office, relating to loss or injury incurred by owners of freight shipped to the station where the office is located, was made by authorized agents; but there is no presumption that a telephone communication purporting to come from such a local freight office, relating to the general management of the road, was authorized by the railroad company.³⁷ The identification of the voice of the employee has been held necessary by some authorities.³⁸ In the near future, and perhaps before going to press, it may be necessary to record the judicial creation of the first presumptions arising from the dispatch or receipt of aerograms, and that cognizance shall be taken of the natural transmission on or through Herzian waves.

§ 54 (48). Presumptions of existence of partnership.—

It would be impracticable to endeavor to classify the various presumptions according to the standard of their reasonableness, in that the very reason of their existence should be the call of common sense. That one, however, which declares that persons acting as copartners shall be presumed to have entered into a contract of copartnership³⁹ stands high in the facilitation of business both in the worlds of commerce and of litigation. Where several persons carry on the same business together, they are properly presumed to be partners.⁴⁰ Upon the proof by the plaintiff of a copartnership existing between the defendants, Greenleaf says that "the facts being less known to

³⁷ Gilliland & Gaffney v. Southern Ry. Co., 85 S. C. 26, 137 Am. St. Rep. 861, 67 S. E. 20; Rock Island & Peoria Ry. Co. v. Potter, 36 Ill. App. 590.

³⁸ Young v. Seattle Transfer Co., 33 Wash. 225, 99 Am. St. Rep. 942, 63 L. R. A. 988, 74 Pac. 375; Planters' Cotton Oil Co. v. Western Union Tel. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A., N. S., 1180. See, also, § 211, *post*.

³⁹ Cal. Code Civ. Proc., § 1963 (29), and similar provision in other code states.

⁴⁰ McMullan v. Mackenzie, 2 G. Greene (Iowa), 368; Ryder v. Wilcox, 103 Mass. 24; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; St. Louis Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Cothran v. Marmaduke, 60 Tex. 370; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165.

the plaintiff, it is sufficient for him to prove that they (the defendants) have acted as partners, and by their habit and course of dealings, conduct and declarations, they have induced those with whom they have dealt to consider them as partners";⁴¹ or, as put by an authority on the law of copartnership, "if it appear that two persons have in many instances traded jointly, that will be *prima facie* evidence of a general partnership."⁴² And in those cases where each partner has the right to sign the firm name to commercial paper, it will be presumed, when the firm name so appears, that it is signed regularly by authority, and for the purposes of the firm; and the burden of proof is placed upon the partners to show the contrary.⁴³ This presumption will be rebutted by proof that the instrument was given upon other than partnership transactions or in some transaction beyond the scope of the partnership.⁴⁴

§ 54a (48). Presumptions arising from partnership dealings—Knowledge of books.—In addition to that presumption of partnership which has just been mentioned, there exist others arising from the fact of an established partnership equally important. Thus, as between partners, each partner is presumed to have knowledge of the partnership books, and the books are presumed to be correct; hence it is not necessary to show knowledge of particular entries on the part of the partner.⁴⁵ Of course this

⁴¹ Greenleaf on Ev., § 483.

⁴² Col. on Part., § 769.

⁴³ LeRoy v. Johnson, 2 Pet. (U. S.) 186, 7 L. Ed. 391; Jones v. Rives, 3 Ala. 11; Miller v. Hines, 15 Ga. 197; Gregg v. Fisher, 3 Ill. App. 261; Magill v. Merrie, 5 B. Mon. (Ky.) 168; Waldo Bank v. Greely, 16 Me. 419; Thurston v. Lloyd, 4 Md. 283; Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Littel v. Fitch, 11 Mich. 525; Vallett v. Parker, 6 Wend. (N. Y.) 615; Whitaker v. Brown, 16 Wend. (N. Y.) 57; Doty v. Bates, 11 Johns. (N. Y.) 544.

⁴⁴ Mauldin v. Bank, 2 Ala. 502;

Insurance Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Bryan v. Tooke, 60 Ga. 437; Lucas v. Baldwin, 97 Ind. 471; Chenoweth v. Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; First National Bank v. Carpenter, 34 Iowa, 433 (guaranty); Butler v. Stocking, 8 N. Y. 408. The case, however, of Fleming v. Prescott, 3 Rich. (S. C.) 307, 45 Am. Dec. 766, holds that the presumption is not so rebuttable as against a *bona fide* holder.

⁴⁵ Desha v. Smith, 20 Ala. 747; Haller v. Willamowicz, 23 Ark. 566; Hale v. Brennan, 23 Cal. 511; Pond

presumption is disputable, and little more than a mere inference of fact, and may be rebutted by proof that the partner sought to be charged had no actual knowledge or no opportunity for inspection or examination of the books.⁴⁶ In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both parties have had access at the time when those entries were made, or immediately afterward, are to be taken as *prima facie* evidence of the correctness of those entries, subject, however, to the right of either party to show a mistake or error in the charge or credit.⁴⁷

§ 54b (48). **Same — Equality of interest.**—In the absence of any agreement or evidence showing the contrary, there is a presumption that the partners are equally interested both in the capital and in the profits.⁴⁸ So they are

v. Clark, 24 Conn. 370; Stuart v. McKiehan, 74 Ill. 122; Cunningham v. Smith, 11 B. Mon. (Ky.) 325; Parker v. Jonte, 15 La. Ann. 290; Topliff v. Jackson, 12 Gray (Mass.), 565; Allen v. Coit, 6 Hill (N. Y.), 318; Fairchild v. Fairchild, 64 N. Y. 471; Boire v. McGinn, 8 Or. 466.

⁴⁶ United States Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791; Wheatley v. Wheeler, 34 Md. 62; Piano Co. v. Bernard, 2 Lea (Tenn.), 358; Saunders v. Duval, 19 Tex. 467; Layton v. Hall, 25 Tex. 204.

⁴⁷ Heartt v. Corning, 3 Paige Ch. (N. Y.) 566. The English rule appears to be very similar, and is that the books, being accessible to all the partners, and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them, and, therefore, also for any of them against the others. But entries made by one partner without the knowledge of the other do not prejudice the latter as between himself and his copartners: Hutcheson v. Smith, 5 Ir. Eq. 117. See, also, Reeve v. Whitmore, 2 Dr. & Sm. 446,

62 Eng. Reprint, 690, where it was held that although books kept by a person may be used against him as showing what he has received, he is not entitled to use them in his own favor to show what he has paid, and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound, by using it against him, to admit its correctness throughout: Morehouse v. Newton, 3 De G. & Sm. 307, 64 Eng. Reprint, 491.

⁴⁸ Farr v. Johnson, 25 Ill. 522; Gould v. Gould, 6 Wend. (N. Y.) 263; Taylor v. Taylor, 2 Murph. (6 N. C.) 70; Conwell v. Sandridge, 5 Dana (Ky.), 210; Jones v. Jones, 1 Ired. Eq. (36 N. C.) 332; Donelson v. Posey, 13 Ala. 752; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713; Roach v. Perry, 16 Ill. 37; Harris v. Carter, 147 Mass. 313, 17 N. E. 649. There is an English authority to the contrary, however: Peacock v. Peacock, 16 Ves. 49, 2 Camp. 45, 33

presumed liable to the payment of losses in the same proportion that they are entitled to share the profits.⁴⁹ It is thus expressed by Bates: "In the absence of agreement or evidence as to the proportions of profit and loss to be divided between the partners, the presumption is in favor of the equality of the shares. It makes no difference that one partner has contributed all the capital, and the other only services or skill, for the court cannot set a proportional value upon these respective contributions. . . . It follows, from the same reasons, that if the contribution to capital is in unequal proportions, the profits and losses are not presumably to be shared in the ratio of the shares of capital, but equally."⁵⁰

§ 54c (48). Same — Other presumptions. — There are called into existence, though more rarely, other presumptions, such as against a partner to whose negligence or misconduct the nonproduction of proper accounts is due;⁵¹ unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm;⁵² the general presumption against illegality attaches to every partnership;⁵³ and that of con-

Eng. Reprint, 902. But as to real estate, the presumption is against its being partnership property: See note to *Goldthwaite v. Janney*, 48 Am. St. Rep. 66.

⁴⁹ *In re Albion Life Assur. Soc.*, L. R. 16 Ch. D. 83; *Robinson's Exrs. Case*, 6 De Gex, M. & G. 572, 43 Eng. Reprint, 1356.

⁵⁰ *Bates on Partn.*, § 181; *Peacock v. Peacock*, 16 Ves. 49, 2 Camp. 45, 33 Eng. Reprint, 902; *Thompson v. Williamson*, 7 Bligh, N. S., 432, 5 Eng. Reprint, 833. See, also, *Towner v. Lane's Admr.*, 9 Leigh (Va.), 262; and *Hoffman, J.*, in a dissenting opinion in the case of *Hasbrouck v. Childs*, 3 Bosw. (N. Y.) 114; 1 Dom. Civil Law, tit. 8, § 5. See, also, *Poth. Partn.*, notes 15, 16, 73; *Story Partn.*, 7th ed., § 25. See *Jackson v. Crapp*, 32 Ind. 422.

Lindley makes some sound observations on this rule around the proposition that though it occasionally leads to apparent injustice, it is the best which can be adopted, by reason of the difficulty in measuring the value of each partner's contribution: *Lindley on Partn.*, 7th ed., p. 385. The English Partnership Act of 1890, section 24 (1), reads: "All partners are entitled to share equally in the capital and profits of the business, and must contribute equally toward the losses, whether of capital or otherwise, sustained by the firm."

⁵¹ *Lindley on Partn.*, 7th ed., p. 439.

⁵² English Partnership Act 1890, sec. 21.

⁵³ *Lindley on Partn.*, 7th ed., p. 105.

tinuance, once there is evidence that a partnership did exist at one time;⁵⁴ and a dissolution of a partnership at will may be inferred from circumstances, such as a quarrel, although no notice to dissolve may have been given.⁵⁵ It cannot be presumed from the fact of a deed of lands to two men as individuals, who are in fact partners under the style of their surnames in a mercantile business, that such lands are partnership property.⁵⁶

§ 55 (49). Presumptions of regularity in acts of private corporation.—We have already discussed the proposition that persons who act in a public capacity as officers are presumed to have been regularly appointed or elected;⁵⁷ and have dealt with the regularity of official acts and the performance of official duty.⁵⁸ There remains now only to consider the different occasions on which the application of the presumption has been made to corporate acts.

The same presumption obtains in respect to those who act publicly as the officers of private corporations. *Prima facie* they will be deemed rightfully in office rather than intruders, and the requirements necessary to their appointment will be presumed to have been complied with.⁵⁹ So there is a presumption that the officers of the corporation

⁵⁴ *Id.*, p. 102.

⁵⁵ *Id.*, p. 604; *Pearce v. Lindsay*, 3 De Gex, J. & Sm. 139, 46 Eng. Reprint, 591.

⁵⁶ *Lee v. Wysong*, 128 Fed. 833, 63 C. C. A. 483. It is well settled by authority that real estate purchased with partnership funds for partnership purposes, and appropriated to partnership uses is, in equity, presumed to be partnership property; and that, under such circumstances, it matters not if the legal title is taken or held in the name of a part or all of the partners as tenants in common. Upon proof of these facts of purchase and appropriation, unless the presumption arising therefrom be rebutted, equity will treat the property as partnership stock: *Story on Part.*, 153, and cases there cited; *Duryea v. Burt*, 28 Cal. 580.

The real estate of a partnership must be purchased with partnership funds to make it partnership property: *Pugh v. Currie*, 5 Ala. 446; *Owens v. Collins*, 23 Ala. 837; *Matlock v. Matlock*, 5 Ind. 403; *Patterson v. Blake*, 12 Ind. 436. If there is no proof that it is purchased with partnership funds, it will be presumed to be held by the parties as tenants in common or joint tenants: *Thompson v. Bowman*, 6 Wall. (U. S.) 316, 18 L. Ed. 736.

⁵⁷ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552. See § 43, *ante*.

⁵⁸ See §§ 41, 45, 46, *ante*.

⁵⁹ *Selma & Tenn. Ry. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Hilliard v. Goold*, 34 N. H. 230, 66 Am. Dec. 765.

have acted regularly; for example, where the common seal of the corporation appears to be attached to an instrument and the signatures of the officers are proved, the seal is presumed to have been affixed by proper authority in those cases where the execution of the instrument would be ordinarily within the power of such officers.⁶⁰ The establishment and posting by the president of a corporation of tariff of freights and fares on a railroad, and the receipt and appropriation by the corporation of fares taken on such tariffs, without objection, raises the legal presumption that the president acted by authority of the corporation in thus fixing and posting such tariffs.⁶¹ Where an act purports to be the act of a board of directors, it may be presumed to be the act of the majority.⁶² It is presumed that meetings of a corporation were regularly held upon due notice with a quorum present;⁶³ that the board of directors was rightfully in session when authorizing the execution of a note;⁶⁴ that the requisite number of directors was present at a meeting, if the minutes show that business was transacted thereat.⁶⁵ The granting of a charter may be presumed from long-continued user of a corporate franchise, as may also the acceptance of charters and beneficial grants;⁶⁶ but the transaction of business by officers with-

⁶⁰ *Canandarqua Academy v. McKechnie*, 90 N. Y. 618; *Mickey v. Stratton*, 5 Saw. (U. S.) 475, Fed. Cas. No. 9530; *Wood v. Whelen*, 93 Ill. 153; *Thorington v. Gould*, 59 Ala. 461; *New England Iron Co. v. Gilbert El. R. R. Co.*, 91 N. Y. 153; *Solomon's Lodge v. Montmollin*, 58 Ga. 547; *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316. See the *Tate* cases: *State v. Heffernan*, 243 Mo. 442, 148 S. W. 90; *Brookline Canning etc. Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828; *Donovan v. Erie R. Co.*, 77 Misc. Rep. 548, 137 N. Y. Supp. 113.

⁶¹ *Hilliard v. Gould*, 34 N. H. 230, 66 Am. Dec. 765.

⁶² *Dispatch Line v. Bellamy M. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

⁶³ *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

⁶⁴ *Hardin v. Iowa Ry. Co.*, 78 Iowa, 726, 6 L. R. A. 52, 43 N. W. 543.

⁶⁵ *Hathaway v. Addison*, 48 Me. 440; *Insurance Co. v. Sortwell*, 8 Allen (Mass.), 223; *Baile v. Calvert College*, 47 Md. 117. In *Mayberry v. Mead*, 80 Me. 27, 12 Atl. 635, the meeting was before the corporation was organized, and it neither appeared that a majority was present or otherwise acted in accordance with the statute.

⁶⁶ *Selma & Tenn. Ry. Co. v. Tip-ton*, 5 Ala. 787, 39 Am. Dec. 344; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *Bank of United States v. Dan-dridge*, 12 Wheat. (U. S.) 64, 6 L.

out proof of organization or existing charter is not sufficient to raise the presumption of corporate existence.⁶⁷ Nevertheless, in proceedings to which a corporation is not a party and the question of incorporation arises incidentally, incorporation will be assumed from user and the exercise of corporate privileges and acts.⁶⁸ In proceedings for the expulsion of members, it will be presumed that the proceedings were fair and regular.⁶⁹ No presumption, however, arises in favor of regularity of a corporation's proceedings to forfeit property or other valuable rights.⁷⁰ And generally where agents or officers of the corporation are acting within the apparent scope of their powers, it will be presumed that their acts are authorized by all necessary formalities. The presumption is that the provisions of law have been complied with by the officers, not

Ed. 554. For further illustrations, see note in 22 L. R. A. 276, on the presumption of incorporation appended to *In re Gibbs' Estate*, 157 Pa. 59, 22 L. R. A. 276, 27 Atl. 383.

⁶⁷ *Clark v. Jones*, 87 Ala. 474, 6 South. 362; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *De Witt v. Hastings*, 8 Jones & S. (N. Y.) 463; *Bank of United States v. Stearnes*, 15 Wend. (N. Y.) 314.

⁶⁸ *United States v. Amedy*, 11 Wheat. (U. S.) 392, 6 L. Ed. 502; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *Ricketson v. Galligan*, 89 Wis. 394, 62 N. W. 87; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528 (the case of a foreign corporation suing, though that fact was not averred in the complaint, and they were presumed to be a legally incorporated company). In criminal cases the same rule obtains, and evidence that a corporation was acting as such, that it was a *de facto* corporation, has been held sufficient: *People v. Frank*, 28 Cal. 519; *People v. Ah Sam*, 41 Cal. 652; *People v. Hughes*, 29 Cal.

260; *Miller v. People*, 13 Colo. 166, 21 Pac. 1025; *State v. Byrne*, 45 Conn. 281; *State v. Tucker*, 84 Mo. 25; *Shinn v. Commonwealth*, 32 Gratt. (Va.) 908; *State v. Missio*, 105 Tenn. 218, 58 S. W. 216. A corporation indicted for a statutable offense will not be permitted to escape punishment by showing that the act constituting the offense was *ultra vires*. It will be presumed to have knowingly and willfully violated the statute: *Louisville Ry. Co. v. Commonwealth*, 130 Ky. 738, 132 Am. St. Rep. 408, 114 S. W. 343; and see note to *People v. Rochester Ry. etc. Co.* (195 N. Y. 102, 21 L. R. A., N. S., 998, 88 N. E. 22), 133 Am. St. Rep. 770, on the prosecution and punishment of corporations for crime.

⁶⁹ *Bachmann v. N. Y. Arbitrator*, 64 How. Pr. (N. Y.) 442; *Harmon v. Dreher*, 1 Speers' Eq. (S. C.) 87; *Shannon v. Frost*, 3 B. Mon. (Ky.) 253; *People ex rel. Burton v. St. George Society*, 28 Mich. 261.

⁷⁰ *People v. Fire Department*, 31 Mich. 458; *People v. Medical Society*, 32 N. Y. 187.

that they have been violated.⁷¹ After a corporation has gone into operation and rights have been acquired under it, every reasonable presumption is indulged in favor of its legal existence. It is sufficient to establish the existence of the corporation *de facto* to show, "first, the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and second, a user, by the party to the suit, of the rights claimed to be conferred by such charter or law."⁷² The same presumption applies to associations acting as corporations, and they as well as individuals dealing with them may be estopped from denying the corporate existence. In a California case⁷³ we find the following clear expression: "We think that the evidence in support of the finding that the plaintiff was a corporation, acting in good faith as such, is sufficient. It was recognized in the community as a corporation, the records of its proceedings show that it was so acting, and in all its dealings it was styled as a corporation; it has pursued corporate forms of action, held corporate meetings, and, we think, comes within the provisions of section 358 of the Civil Code, which provides that 'the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party.'"⁷⁴

⁷¹ Sargeant v. Webster, 13 Met. 497, 46 Am. Dec. 743; Friend v. Smith etc. Co., 59 Ark. 86, 26 S. W. 374; White v. Barlow, 72 Ga. 887; McWethy v. Aurora etc. Co., 202 Ill. 218, 67 N. E. 9; Ashtabula Ry. Co. v. Smith, 15 Ohio St. 328; Lane v. Brainerd, 30 Conn. 565; Gregory v. Brooks, 37 Conn. 365; Chouteau Ins. Co. v. Holmes, 68 Mo. 601, 30 Am. Rep. 807; Wells v. Rahway Rubber Co., 19 N. J. Eq. 402; McDaniels v. Flower Brook Co., 22 Vt. 274; Leavitt v. Oxford Mining Co., 3 Utah, 265, 1 Pac. 356; Copp v. Lamb, 12 Me. 312; Bank of Minneapolis v. Griffin, 168 Ill. 314, 48 N. E. 154;

Pringle v. Woolworth, 90 N. Y. 502; Puget Sound & C. R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929.

⁷² Duke v. Cahawba Co., 10 Ala. 82, 44 Am. Dec. 472; Methodist Church v. Pickett, 19 N. Y. 482; United States Bank v. Stearnes, 15 Wend. (N. Y.) 314.

⁷³ Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Oroville & V. R. R. v. Plumas Co., 37 Cal. 361.

⁷⁴ See, also, Tipton Co. v. Barnheisel, 92 Ind. 88; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; Skinner v. Richardson, 76 Wis. 464, 45 N. W. 318; Andrews v. Nat. Foundry & Pipe

§ 56 (50). **Same—General scope of the rule.**—There can be no doubt that some difficulty exists in defining the presumptions of regularity in acts of private corporations, but it appears that the presumption is not affected by the fact of the corporation being *de facto* only and not *de jure*, the more especially as the recognition of a *de facto* corporation is to a large extent itself due to a presumption. Where there has been a corporate body *de facto* for a considerable time claiming to be a corporation, and holding and enjoying property as such, it will be presumed that all merely formal requisites to the due creation of a corporation have been complied with.⁷⁵ The presumptions as to the grant of the charter, and its acceptance and the powers conferred by it, of the continuance of corporate existence, the seal of the corporation, the acceptance of agency and the powers of agents, the acceptance of grants, the ratification by shareholders, the regularity of meetings, the correctness of stock books, the notice of directors of the affairs of the corporation, all come within the broad scope of the rule which has been so well stated by Mr. Justice Story in a leading case.⁷⁶ “Persons acting publicly as officers of the corporation are to be presumed right-fully in office; acts done by the corporation, which presup-

Works, 77 Fed. 774, 36 L. R. A. 153, 23 C. C. A. 454; *Town of Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996, 15 Sup. Ct. Rep. 954. Where the existence *de facto* is unquestioned, the existence *de jure* can be challenged only by public authority in the manner provided by law: *Frost's Lessee v. Frostburg Coal Co.*, 24 How. (U. S.) 278, 16 L. Ed. 637; 4 Am. & Eng. Ency. of Law, pp. 198, 199, and cases there cited.

⁷⁵ *All Saints Church v. Lovett*, 1 Hall (N. Y.), 213. See, also, *United States v. Amedy*, 11 Wheat. (U. S.) 392, 6 L. Ed. 502; *Selma & Tennessee R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

⁷⁶ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L.

Ed. 552. See the following late cases on the general subject “The Presumption of Regularity”: *Harton v. Little* (Ala.), 57 South. 851; *Scanlon v. Scanlon* (Iowa), 135 N. W. 634; *Gutschenritter v. Whitmore* (Iowa), 139 N. W. 567; *Hartwell v. Parks*, 240 Mo. 537, 144 S. W. 793; *Jacobus v. Jamestown Mantel Co.*, 149 App. Div. 356, 134 N. Y. Supp. 418; *Wilhelm v. Wood*, 151 App. Div. 42, 135 N. Y. Supp. 930; *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242; *Aaron v. Bayou* (La.), 59 South. 130; *Lawler v. Vette*, 166 Mo. App. 342, 149 S. W. 43; *Cecil's Committee v. Cecil*, 149 Ky. 605, 149 S. W. 965; *Commonwealth v. Louisville etc. R. Co.*, 149 Ky. 829, 150 S. W. 37.

pose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part which can be reasonably accounted for only upon the supposition of such acceptance are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank and is recognized by the directors or the corporation as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumption as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them as matters of right or matters of duty."

§ 57 (51). Miscellaneous presumptions from the general course of business — Sequence of acts.—The number and variety of presumptions, which rest upon the fact that certain acts are always performed in a certain way, preclude any hope of classifying them, and the best that can be done is to give name to those which play the most prominent part in human affairs. Among the most important is that which regulates the sequence of events. In every-day life it frequently happens that several acts which ought, in the ordinary course, be done in regular order as to time are not so done. Instances of this are the execution of a conveyance from vendor to purchaser and mortgage back by purchaser to vendor, orders given on a debtor for part of the money in his possession and for the balance, the signature of the maker and guarantor of a note, or of a deed of trust to secure payment of a note and the note itself—these, and many more illustrations

hardly need the explanation that, strictly speaking, they should have been executed in the order of their legal happenings; the deed of purchase before the mortgage, the order for part of the money in the debtor's hands before the one for the balance, the maker's signature before the guarantor's, and so on. But experience has shown that they are frequently executed without that order, and then, if the transaction is attacked on that ground, the law raises the presumption that they were duly executed in the orderly method which insures their effectiveness.⁷⁷

§ 57a (51). Same—Traders acquainted with usages of business—Custom.—When persons are engaged in any particular trade, the presumption is that they are acquainted with the value and intrinsic worth of the articles which they are engaged in buying and selling, and with the general customs and usages of the business where it is carried on, and with such other facts as are necessarily incident to the proper conduct of the business. And so it is to be presumed that bankers and money brokers are better acquainted with the genuineness and value of the circulation of banks, the paper of which they buy, than is the community generally. Their opportunities are better, and the interest of their business necessarily leads them to inform themselves in this respect beyond other persons. Courts take judicial notice of the general customs and usages of merchants, and of whatever ought to be generally known within the limits of their jurisdiction.⁷⁸ And in the case

⁷⁷ James River & Kanawha Co. v. Littlejohn, 18 Gratt. (Va.) 53 (orders for payment of money); Graham v. O'Fallon, 4 Mo. 601 (blanks in a will seen before execution); Ivy v. Yancey, 129 Mo. 501, 31 S. W. 937 (purchase deed and mortgage); Duncanson v. Kirby, 90 Ill. App. 15 (maker and guarantor of a note); Fitzgerald v. Barker, 85 Mo. 13 (deed of trust to secure note); Hughes v. Debnam, 53 N. C. 127 (grantor and attesting witness); Newell v. White,

29 R. I. 343, 73 Atl. 798 (testator and attesting witnesses).

⁷⁸ 1 Greenl. Ev., §§ 4-6; British & American Mortgage Co. v. Tibbals, 63 Iowa, 468, 19 N. W. 319; Hursh v. North, 40 Pa. 241 (a custom is something which has the force and effect of law; is law by the usage and consent of the people. But it must be uniform and universal within the sphere of its action, and so ancient "that the memory of man runneth not to the contrary": 1 Bl. Comm. 68-74).

of a custom, as to a specific matter, an excellent illustration is to be found in a North Carolina case,⁷⁹ that where rice had been deposited in a mill to be there treated and was destroyed by fire, and a general custom was proved that a voucher for the quantity of rice deposited was always given to the owner, in the absence of any evidence showing that from some cause or other the custom was departed from, there is "a violent presumption" that the owner did obtain such voucher.⁸⁰

§ 57b (51). **Same—Negotiable instruments in possession of party primarily liable.**—There is no question that the cases are abundant, and of the highest authority, that ordinarily a presumption of payment may be indulged by the jury or court from the possession by the debtor of the security or obligation, because it accords with the ordinary course of dealing that, when one pays his note or bond, or other security, he usually takes it up. Ordinary prudence dictates that he retain his money until the creditor produces and delivers up the security.⁸¹ It is presumed, therefore, from the known and general custom of business that, when a bill of exchange or order is found after circulation in the possession of the drawee, the money has been paid or the obligation discharged.⁸² So possession of a promissory note by the maker or a canceled bank check by the drawer raises the presumption of pay-

⁷⁹ *Ashe v. De Rossett*, 53 N. C. 240.

⁸⁰ *Young v. Turing*, 2 Man. & G. 593, 603, 2 Scott (N. R.) 752; *Hinckley v. Kersting*, 21 Ill. 247, 74 Am. Dec. 102; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Mills v. United States Bank*, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; *Sutton v. Tatham*, 10 Adol. & El. 27, 113 Eng. Reprint, 11; *Given v. Charron*, 15 Md. 502; *Pittsburg v. O'Neill*, 1 Pa. 342; *Mowry v. Saunders*, 33 R. I. 451, Ann. Cas. 1913A, 1344, 80 Atl. 421; *Rindskoff v. Barrett*, 14 Iowa, 101; *John O'Brien Lumber Co. v. Wilkin-*

son, 123 Wis. 272, 101 N. W. 1050. See, also, the article "Presumptions in Customs and Usages" and the numerous illustrations of particular customs in 3 Ency. of Ev., p. 951 et seq.

⁸¹ *Lawson, Pres. Ev.* 3466; *Connelly v. McKean*, 64 Pa. 118; *Haywood v. Lewis*, 65 Ga. 224; *Lipscomb v. De Lemos*, 68 Ala. 592; *Erlhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188.

⁸² *Egg v. Barnett*, 3 Esp. 196; *Garlock v. Geortner*, 7 Wend. (N. Y.) 198; *Weidner v. Schweigart*, 9 Serg. & R. (Pa.) 385; *Connelly v. McKean*, 64 Pa. 113.

ment.⁸³ As we have already pointed out, the code states have enacted as disputable presumptions that an obligation delivered up to the debtor has been paid, and that a person in possession of an order on himself for the payment of money or the delivery of a thing has paid the money or delivered the thing accordingly.⁸⁴

§ 57c (51). Same—Agreement to pay for valuable services.—There is also a presumption of an agreement to pay for valuable services rendered and accepted. Where one man at the request of another performs beneficial services for him, unless it is agreed, or it can be so inferred from the circumstances, that the services were to be rendered without compensation, the law, in the absence of any express contract, will imply a promise on the part of him for whom the services were rendered to pay for them what they are reasonably worth.⁸⁵ But there is no such presumption where the dealings are between those of the same family or those closely related by blood or marriage; in such cases an actual agreement must be proved.⁸⁶

⁸³ Daniel on Neg. Inst., § 1228, and cases there noted.

⁸⁴ Cal. Code Civ. Proc., §§ 9, 13.

⁸⁵ Ford v. Ward, 26 Ark. 360; St. Patrick's Church v. Abst, 76 Ill. 252; McCrary v. Ruddick, 33 Iowa, 521; Camfrancq v. Pilie, 1 La. Ann. 197; Farmington Academy Trustees v. Allen, 14 Mass. 172, 7 Am. Dec. 201; Dougherty v. Whitehead, 31 Mo. 255; In re Scott, 1 Redf. (N. Y.) 234; Jones v. Woods, 26 Smith (Pa.), 408; Hurst v. Hite, 20 W. Va. 183.

⁸⁶ The proposition that for services rendered by one to another the law implies a promise to pay has several exceptions, among which are those cases falling within the limits of services rendered by members of a family and near and certain distant relations, connected either by consanguinity or affinity, who are residing under the one roof. The reason for

these exceptions is founded on a legal presumption that where parties, who are related, live together as a matter of mutual convenience, the law will not imply a promise of compensation for services rendered. And although that presumption exists in the cases above referred to, it must be borne in mind such presumption is not peculiar to that relationship. It all goes back to the contractual intention. If one renders a service to another without intending to charge for it—to ask for compensation—or to lay the foundation for a legal liability, resting merely in the satisfaction which the performance of a kindly gratuitous act entails, then, no matter what construction is put upon the other's expressions of gratitude—whether they are mistakenly regarded in the light of “a lively sense of favors to come” or not; whether

§ 57d (51). **Same—Solvency.**—The existence of the presumption of solvency, apart from the presumption as to continuance of the existing state of things treated in the next chapter, has always been recognized.⁸⁷ “Is it not safe to assume,” says Lumpkin, J., “and the country and the courts act upon this assumption, that a firm is solvent until the contrary appears, and that the apparent interest of each person is to be considered and treated as his actual interest, until rebutted by proof?” Of course this presumption may be rebutted by proof of unsatisfied judgments or that a debt cannot be collected.⁸⁸

§ 57e (51). **Same—Other presumptions arising from the general course of business.**—There are many other pre-

in the hope of some proportionate or disproportionate return—the doer of the act is not legally entitled to any compensation, if his expectations are not realized: *Castle v. Edwards*, 63 Mo. App. 564; *Swires v. Parsons*, 5 Watts & S. (Pa.) 357. “Such being the law between strangers, *a fortiori* the claims of members of a family for compensation for services rendered, the one to the other, must be established on a still wider and firmer basis, and we shall demonstrate that the presumption that the services rendered by or between those near and sometimes those distantly related, who are living together, are gratuitous is so strong, that no chance of rebuttal can be discerned save by the crystal light of an express contract, the power of which must be raised still higher if the claim is made after the death of the alleged debtor.” The above excerpt is made from one of the late A. C. Freeman’s notes on the presumption of gratuitous services by relations, and will be found to cover the whole ground of such services whether by blood relations, persons related by affinity and services rendered by *quasi* members of the family—adopted children—illegitimate chil-

dren and *de facto* members of the family. The note will be found appended to the case of *Hardman’s Admr. v. Crick*, 131 Ky. 358, 133 Am. St. Rep. 248, 115 S. W. 236. See, also, *Wilcox v. Wilcox*, 48 Barb. (N. Y.) 327; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Andrus v. Foster*, 17 Vt. 556; *Robinson v. Cushman*, 2 Denio (N. Y.), 149; *Fitch v. Peckham*, 16 Vt. 150; *Weir v. Weir*, 3 B. Mon. (Ky.) 645, 39 Am. Dec. 487; *Davies v. Davies*, 9 Car. & P. 87; *King v. Kelly*, 28 Ind. 89; *Cauble v. Ryman*, 26 Ind. 207; *Gallagher v. Vought*, 8 Hun (N. Y.), 87; *Tyler v. Burrington*, 39 Wis. 376; and note to *Hodge v. Hodge*, 11 L. R. A., N. S., 891, as to right of payment for services rendered by child to parent, where the latter is not of the same household. See note to *Page v. Page*, 6 Ann. Cas. 512.

⁸⁷ *Wallace v. Hull*, 28 Ga. 68.

⁸⁸ *Beeson v. Wiley*, 28 Ala. 575; *Bilberry v. Mobley*, 20 Ala. 260 (the party against whom the evidence was offered could protect himself fully by cross-examination, and have shown that the failure of the creditor to collect was not in fact owing to the inability of the debtor to pay).

sumptions arising out of the general course of business to which attention might be directed, some of which, however, are of minor importance, and their omission need not be felt as a loss by the student who may with safety apply to them the several rules hereinbefore set forth. Those which must be mentioned in passing are especially the presumptions which the law raises as to the effect of time on the performance of various acts of a business character. In the absence of any agreement as to time of payment when goods are sold, it is presumed that they are to be paid on delivery,⁸⁹ that acts agreed to be performed, no time being specified, are to be performed within a reasonable time;⁹⁰ and that one who purchases goods, and for a long time makes no objection to them, waives objections to their quality.⁹¹ So where a statement of accounts for goods sold is rendered and no objection is made, the account is presumed correct;⁹² when regular entries of account of the sale of goods have been made by a clerk, since deceased, the presumption is that the goods were duly delivered;⁹³ and a receipt for rent due the last year or the last quarter is presumptive evidence of the payment of former rents.⁹⁴ A presumption arises against the validity of a claim on which no demand for payment has been made for many years, though the insolvency of the debtor or other circumstances of explanation may rebut the presumption.⁹⁵ In business transactions persons are presumed to have done what it was for their interest to do. It is on this theory that it has often been presumed that devises, conveyances, assignments

⁸⁹ *Roberts v. Wilcoxson*, 36 Ark. 355. Among the late cases of miscellaneous presumptions are: *Fairchild v. Llewellyn Realty Co.* (N. J.), 82 Atl. 924 (bond worth its face value); *West Lumber Co. v. Chessher* (Tex. Civ. App.), 146 S. W. 976 (owner's knowledge of boundaries); *Beneke v. Beneke* (Minn.), 138 N. W. 689 (payee not indebted to maker of note).

⁹⁰ *Potter v. Deboos*, 1 Stark. 82.

⁹¹ *Davis v. Fish*, 1 G. Greene (Iowa), 406, 48 Am. Dec. 387.

⁹² *Webb v. Chambers*, 3 Ired. (N. C.) 374.

⁹³ *Clarke v. Magruder*, 2 Harr. & J. (Md.) 77.

⁹⁴ *Brewer v. Knapp*, 1 Pick. (Mass.) 332.

⁹⁵ *Denniston v. McKeen*, 2 McLean (U. S.), 253, Fed. Cas. No. 3803; *Rodman v. Hoops*, 1 Dall. (Pa.) 83, 1 L. Ed. 47; *Milledge v. Gardner*, 33 Ga. 397.

for the benefit of creditors, charters and other acts usually beneficial to the recipient have been assented to;⁹⁶ and on the same principle the assent of a widow to a beneficial testamentary provision, in lieu of a dower, has been presumed.⁹⁷

⁹⁶ *Towson v. Tickell*, 3 Barn. & Ald. 31, 106 Eng. Reprint, 575; *Thompson v. Leach*, 2 Salk. 618, 91 Eng. Reprint, 523; *Bensley v. Atwill*, 12 Cal. 231; *Lady Superior v. McNamara*, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184; *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Newton v. Carberry*, 5 Cranch C. C. 632, Fed. Cas. No. 10,-

190. For cases where the presumption was held not to have arisen, see *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Welch v. Sackett*, 12 Wis. 243; *Hulick v. Scovil*, 9 Ill. 159; *Governor v. Campbell*, 17 Ala. 566; *Benning v. Nelson*, 23 Ala. 801; *Cloud v. Clinkinbeard*, 8 B. Mon. (Ky.) 397, 48 Am. Dec. 397.

⁹⁷ *Merrill v. Emery*, 10 Pick. (Mass.) 507.

CHAPTER 3.

PRESUMPTIONS (CONTINUED).

- § 58. Presumptions as to Continuance of the Existing State of Things—Introductory.
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- § 103. Innocence—Sanity—Weight of Conflicting Presumptions.
- § 104. General Rules as to Presumptions.

§ 58 (52, 53, 54). Presumptions as to continuance of the existing state of things—Introductory.—In closing the chapter on presumptions, Professor Thayer mournfully remarks that the mass of propositions figuring in the cases under the name of presumptions are “quite too heterogeneous and noncomparable in kind, and quite too loosely conceived of and expressed, to be used or reasoned about without much circumspection.”¹ It would be hopeless to attempt to classify the chaotic mass of presumptions without first arriving at a definite interpretation of what a presumption shall be taken to mean. That work of interpretation and classification must be left for the present, and the working lawyer will surely be satisfied with such exposition as we can make of the matter in hand. Whether the presumption is legitimate or logical, foreign or indigenous, must be left to the legal scientists to decide. We shall continue to deal with what are called and commonly known as presumptions, and tell the latest law of them, so that they can be applied in future with as little risk of error as possible. We can lay down only one broad rule—that any so-called presumption that is opposed to common sense should be discarded, for the reason that a pre-

¹ Thayer, Prel. Treat. on Ev. 351. The remainder of the learned professor's remarks command reproduction. “Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name; some express merely a natural probability, and others, for the sake of having a definite line, establish a mere rule of legal policy; very many of them, like the rule about children born in wedlock, lay down a *prima facie* rule of the substantive law, and others, a rule of general reasoning, and of procedure, founded on convenience or probability or good sense; like the wide-reaching principle which ‘presumes a usual and ordinary state of things rather than a peculiar and exceptional condi-

tion, . . . legality rather than crime, and virtue and morality rather than the opposite qualities, which demands a construction of evidence as well as of written language, *ut res magis valeat quam pereat*’ (Denio, J., in *Caujolle v. Ferrie*, 23 N. Y. 90, 138). Some are maxims, others mere inferences of reason, others rules of pleading, others are variously applied; as the presumption of innocence figures now as a great doctrine of criminal procedure, and now as an ordinary principle in legal reasoning, or a mere inference from common experience, or a rule of the law of evidence. Among things so incongruous as these and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick his way and walk with caution.”

sumption can only be a common-sense inference founded on fact. With this—perhaps the only rule that may safely be enunciated—we shall apply ourselves to those important branches of the subject for which this chapter was reserved.

§ 58a (52, 53, 54). Presumptions as to continuance of the existing state of things—Generally.—As we have shown, once a fact is established, inferences flow from it in proportion to the variety of circumstances which surround it. One ever-present inference must result as soon as that fact is proved to exist—namely, that as soon as it passes from the now to the then of its term—as soon as it has passed from the present, it is presumed to have remained in existence until the contrary is proved. We advisedly repeat the alternative, although it is understood with every disputable presumption. When things are once proved to have existed in a particular state, they are presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive.² Although this rule has long had the sanction of the highest authority, it will be observed that it is stated in very general terms; and it must have a reasonable interpretation. It is a presumption always disputable, sometimes entitled to considerable weight, but frequently liable to be rebutted by very slight circumstances. The rule has been held to

² Best, Ev., 10th ed., § 405; Tayl. Ev., 10th ed., § 196; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Martin v. Fishing Ins. Co., 20 Pick. 389, 32 Am. Dec. 220; State v. Chittenden, 112 Wis. 569, 88 N. W. 587; State v. Chittenden, 127 Wis. 468, 107 N. W. 500; Price v. Price, 16 Mees. & W. 232; Berrenberg v. City of Boston, 137 Mass. 231, 50 Am. Rep. 296, and long note. See, also, the late cases: Rucker v. Jackson (Ala.), 60 South. 139; People v. Quong Sing, 20 Cal. App. 26, 127 Pac. 1052; In re Weedman's Estate, 254 Ill. 504, 98 N. E. 956; Barker v.

Chicago etc. R. Co. (Ind. App.), 99 N. E. 135; Nelson v. Jones (Mo.), 151 S. W. 80; Dehner v. Miller, 166 Mo. App. 504, 148 S. W. 953; Wichern v. United States Exp. Co. (N. J.), 83 Atl. 776; Carlson v. City of New York, 150 App. Div. 264, 134 N. Y. Supp. 661; Silberblatt v. Brooklyn etc. Messenger Co., 150 App. Div. 268, 134 N. Y. Supp. 765; Somerville v. City of New York, 78 Misc. Rep. 203, 137 N. Y. Supp. 919; McMahon v. Mead (S. D.), 139 N. W. 122; Ralls v. Parish (Tex. Civ. App.), 151 S. W. 1089.

apply to the continuance of minority, a given state of health, a state of war and to other cases where obviously, after a limited time, the presumption could have very little weight. The cases cited in the following subsections will give illustrations of the application of the rule with its limitations.

§ 58b (52, 53, 54). Same—Possession of either realty or personalty.—Possession of either realty or personalty once proved is presumed to continue until the contrary is shown. Thus, it is proved that at a given time B was seised of certain land. The presumption is that such seisin continues, and the burden is on him who alleges disseisin.³ Again, certain land is devised to executors with power to sell. If no conveyance from them is shown, the presumption is that they did not execute the power.⁴ Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession until there is evidence that he has parted with that ownership or right of possession; and the mere fact that the property is in the possession of another, with his consent, does not raise a legal presumption of change of title so as to shift the burden of proof upon the original owner to show that he retains his right of property and his right of possession thereon.⁵ Whenever the possession of one person is once shown to have been in subordination to the title of another, it will not be adjudged afterward adverse to such title without clear and positive proof of its having distinctly become so; for every presumption is in favor

³ *Brown v. King*, 5 Met. (Mass.) 173; *Sullivan v. Goldman*, 19 La. Ann. 12; *Leport v. Todd*, 32 N. J. L. 128; *Currier v. Gale*, 9 Allen (Mass.), 522; *Rhone v. Gale*, 12 Minn. 54; *Gray v. Finch*, 23 Conn. 513; *Winkley v. Kaime*, 32 N. H. 268; *Pickett v. Packham*, L. R. 4 Ch. App. 190. The division of these cases and of the subject generally in this and the next three sections is

made and adapted from an article in 28 Albany Law Journal, 284, in which the presumption of continuance was treated by John D. Lawson, and grateful acknowledgment is made accordingly.

⁴ *Jackson v. Potter*, 4 Wend. (N. Y.) 672.

⁵ *Wells, C. J.*, in *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49.

of the possession continuing in the same subordination to the title.⁶

§ 58c (52, 53, 54). **Same—Nonpossession or loss of property real or personal.**—In a similar manner arises the presumption of nonpossession or loss of real or personal property. Once that eviction from land or loss of chattels is proved to exist, the presumption that such nonpossession or loss still continues will be created. For example, it is proved that a promissory note was given for consideration on November 2, 1848. In an action brought in 1854, the note is not produced, on the ground that it is missing and cannot be found after diligent search. Secondary evidence of the note may be given, for the presumption is that it still exists, unpaid.⁷ In an action of replevin it is proved that a tenant was evicted from his possession. The presumption is that he continues out of possession.⁸ The question is the admissibility of secondary evidence of a document. It is proved that two years ago diligent search was made for the document, but it could not be found. The presumption is that it is still lost, and secondary evidence is admissible.⁹

⁶ Hood v. Hood, 2 Grant's Cas. (Pa.) 229. See, also, Sullivan v. Goldman, 19 La. Ann. 12; Brown v. King, 5 Met. (Mass.) 173; Currier v. Gale, 9 Allen (Mass.), 522; Hollingsworth v. Walker, 98 Ala. 543, 13 South. 6; Sanford v. Milliken, 144 Mich. 311, 107 N. W. 884. This presumption has been applied to ownership: Kidder v. Stevens, 60 Cal. 414; Magee v. Scott, 9 Cush. 148, 55 Am. Dec. 49; Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012; State v. Dexter, 115 Iowa, 678, 87 N. W. 417; Lind v. Lind, 53 Minn. 48, 54 N. W. 934 (the presumption is not rebutted by the fact that another is allowed to take possession); Harri-man v. Queen's Ins. Co., 49 Wis. 71, 5 N. W. 12; Table Mountain Min. Co. v. Waller's Min. Co., 4 Nev. 218, 97 Am. Dec. 526.

⁷ Bell v. Young, 1 Grant's Cas. (Pa.) 175. It was said in this case that a note once proved to have existed is presumed to exist still, unless payment be shown or other circumstances from which a stronger counter presumption arises. It is not necessary for the creditor to prove that the debt is not paid or discharged. The burden of showing that it rests on him who alleges it. And when diligent search has been made, unsuccessfully by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper, and secondary evidence is admissible of its contents.

⁸ Saunders v. Springsteen, 4 Wend. (N. Y.) 429.

⁹ Poe v. Dorrah, 20 Ala. 289, 56 Am. Dec. 196.

§ 58d (52, 53, 54). **Same — Debts.**—The presumption runs right through from possession to nonpossession of property and applies to the existence of debts with precisely the same force. A statute authorizes the issuing of an attachment upon the filing of an affidavit showing the existence of the debt, etc., at the time of the application. An affidavit is made on October 5th, showing a debt, etc., on that day, but is not filed till October 16th, when the attachment is applied for. "The affidavit having shown the debt to be existing and past due on the 5th of October, the legal presumption would follow that it remained due on the 16th of October. If a debt was shown to exist, but not due, after the day of its falling due, there might perhaps arise a legal presumption that the debtor had complied with his contract and paid as per agreement. But when it is once established that there has been a breach of contract, and the debtor has failed to pay at the right time, we are induced to think there is a fair legal presumption arising that the debt continues due and unpaid until something is shown to the contrary, or there is such lapse of time as to raise a contrary presumption."¹⁰ A debt was due from A to B, in January, 1866. In November, 1865, A admitted the debt, and in 1867 B brought suit for it. The presumption is that the debt was still due. "The fact that the debt had not become payable at the time the defendant had admitted its existence does not take the case out of the general rule. Payment being an affirmative fact to be done or performed by the defendant was for the defendant to prove."¹¹ To prove a debt against a bankrupt, an entry in his books some months before the bankruptcy showing that he was indebted to the claimant in a certain sum is proved. The presumption is that the debt still continues.¹² The payment of a debt is evidenced by a receipt under seal—which is conclusive, making an estoppel—or a simple receipt which is *prima facie* evidence and rebuts the presumption of the continuance of the debt. Other circumstances which render the payment probable

¹⁰ O'Neil v. New York etc. Min.
Co., 3 Nev. 141.

¹¹ Farr v. Payne, 40 Vt. 615.

¹² Jackson v. Irvin, 2 Camp. 48.

may also rebut the presumption—as, for example, the settlement of accounts between the parties subsequent to the accruing of the debt, in which settlement no mention of the debt is made, or a receipt for subsequent debts.¹³

§ 58e (52, 53, 54). Same—Other conditions of property or things.—The application of the presumption to other conditions of property includes such important cases as goods in the possession of bailees, the transportation of goods, the seaworthiness of a vessel, the continued existence of customs, and of judicial decisions unreversed, illustrations of which will be found in the following cases: Goods were delivered in a good condition to A, a carrier, who delivered them at the end of his route to B, another carrier. At the end of B's route they were discovered to be damaged. In an action against B, held, that the presumption was that he received them in good condition, and the burden was on him to show that he did not.¹⁴ A

¹³ *Colsell v. Budd*, 1 Camp. 27; *Best, Ev.*, § 406. See, also, *Mullen v. Pryor*, 12 Mo. 307; *Bell v. Young*, 1 Grant Cas. (Pa.) 175; *Wallace v. Hull*, 28 Ga. 68. So a vendor's lien was presumed to continue: *Hays v. Horine*, 12 Iowa, 61, 79 Am. Dec. 518.

¹⁴ *Smith v. New York Central R. Co.*, 43 Barb. (N. Y.) 225. In that case it was said the property was placed in the hands of the Western Railroad Company in good order and condition, and until the contrary is shown must be presumed to have continued in that condition while in the possession of the company. It was delivered by the defendant, after being transported over its road from Albany to Rochester, in a damaged condition, and the further presumption naturally follows that it received the injury while in the possession of the defendant. The general rule is that things once proved to have existed in a particular state are to be presumed to have continued in

that state, until the contrary is established by evidence either direct or presumptive. Unless the rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make much more easily and readily than the converse can be proved by the owner: *Laughlin v. Railway Co.*, 28 Wis. 204, 9 Am. Rep. 493.

vessel was proved to be seaworthy (as to chains, cables, etc.) when she left port in June, 1835. On December 15th she was wrecked, and arrived in port December 24th without sufficient cables, etc. The presumption is that she was sufficiently equipped on December 15th.¹⁵ A guest sued an innkeeper for the loss of packages containing money and securities of great value, which he had given, sealed in an envelope, to his clerk, to be deposited in the safe. The innkeeper denied that the envelope contained that amount of money. It is proved that shortly before that time the guest was seen with this money in his possession. Held, that the presumption was that the guest had such money at the time he alleged he had given it to the clerk.¹⁶ It is shown that a decree in chancery was rendered at a certain time. There is no evidence that it has been reversed or annulled. The presumption is that it is still in force.¹⁷ The question was whether a certain custom existed in the year 1840. The jury found that the custom

¹⁵ *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220; *Watson v. Clark*, 1 Dow. 336, 3 Eng. Reprint, 720; *Parker v. Potts*, 3 Dow. 23, 3 Eng. Reprint, 977.

¹⁶ *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. The language of Hunt, C., in this case is both clear and cogent: "When you prove that shortly before the 20th of April, the plaintiff had in his possession the particular drafts which he claims to have deposited, and the particular bills of \$1,000 and \$100 which he also claims to have deposited, some links in the chain are furnished. Their strength depends upon their nearness and relation to the transaction. If A, at seven o'clock, had seen this envelope and its contents with the plaintiff, and B, at five minutes past seven, had seen him make the deposit, I think the two could, by the inference of the jury, be connected together, although there was an interval when he was not within the sight of either. There is

a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and nonresidence. This analogy is fairly applicable to the present case and justifies the admission of this evidence."

¹⁷ *Murphy v. Orr*, 32 Ill. 489. In an old case to which Mr. Lawson directs attention—*Bacon v. Smith* (1847), 2 La. Ann. 441, 46 Am. Dec. 549—defendants were sued as the maker and indorser of two notes, and pleaded *inter alia* that the notes had been attached. The court said it was not incumbent on the plaintiffs to show that the attachment had been discharged, but it devolved upon the defendants to prove that the proceeding was still in force.

existed in 1689, without more. Held, that the presumption was that the custom existed in 1840.¹⁸

§ 58f (52, 53, 54). **Same—As to domicile—Residence or Nonresidence.**—"It is necessary," said Lord Westbury, in a leading English case, "in the administration of the law, that the idea of domicile should exist and the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place." And Lord Cranworth added: "It is necessary to bear in mind that a domicile, though intended to be abandoned, will continue until a new domicile is acquired, and that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but also until this intention has been carried out by actual residence there."¹⁹ The following illustrations selected by Mr. Lawson are specially apt. An action is brought in Arkansas, in 1841, by B. against P. It is proved that P. resided, in 1824, in Indiana. The presumption is that P. still resides there.²⁰ B., an inhabitant of the town of G., Mas-

¹⁸ *Scales v. Key*, 11 Ad. & El. 819, 113 Eng. Reprint, 625, Lord Denman in this case said that the finding of the jury that the custom had existed since 1689 was to the same effect as if they had found "that it existed until last week," unless something appeared to show that it had been legally abolished.

¹⁹ *Bell v. Kennedy*, L. R. 1 Sc. App. 320. And see as to the presumption of continuance of domicile, residence and nonresidence, *Daniels v. Hamilton*, 52 Ala. 105; *Walker v.*

Walker, 1 Mo. (App.) 404; *Nixon v. Palmer*, 10 Barb. (N. Y.) 175; *Church v. Rowell*, 49 Me. 367; *Littlefield v. Inhabitants*, 50 Me. 475; *Goldie v. McDonald*, 78 Ill. 605.

²⁰ *Prather v. Palmer*, 4 Ark. 456; *Inhabitants of Chicopee v. Inhabitants of Whately*, 6 Allen (Mass.), 508; *Mitchell v. United States*, 21 Wall. (U. S.) 350, 22 L. Ed. 584; *Rixford v. Miller*, 49 Vt. 319; *Eaton v. Woydt*, 26 Wis. 383; *Price v. Price*, 156 Pa. 617, 27 Atl. 291. As to condition of alienage, see *Green*

sachusetts, conveyed his farm on April 1st, and on the twenty-seventh of that month went with his family to his brothers, in the town of T., where he remained until several days after May 1st, returning then to G., and removing on the 27th of May to Illinois. The presumption is that B. had not changed his domicile in G. on May 1st.²¹ Where it is shown that a person was residing at a certain place at a certain time, the ordinary presumption is that such residence was a continuing residence. For what period of time such presumption would last must depend upon all the associated circumstances.²² To except an action on a contract from the bar of the statute of limitation, it is necessary to prove that the defendant was a non-resident at the commencement of the suit. It is proved that he was a nonresident at the time the contract was made. The presumption is that he continued a nonresident, and throws the burden on him to show that he has been within the state a sufficient length of time to create a bar under the statute.²³ Evidence by deposition is allowed to be taken where the witness is more than thirty miles from the place of trial, and unable to attend the court. Before the trial the deposition of H. is taken for this cause. Subsequently when it is offered on the trial, it is alleged that H. is now in town and able to attend. The burden of proving this is on the party alleging this.²⁴

§ 58g (52, 53, 54). **Same—As to solvency or insolvency.** The presumption of the continuance of solvency is of long standing, and is founded on the negative proposition that insolvency is never presumed. An ability to pay his engagements is presumed in favor of everyone, just as the law presumes against fraud and guilt. A is proved to be in solvent circumstances on a certain day. A is presumed

v. Salas, 31 Fed. 106. The rule does not apply in the case of a tramp, however: Ripley v. Hebron, 60 Me. 379.

²¹ Kilburn v. Bennett, 3 Met. (Mass.) 199.

²² Greenfield v. Camden, 74 Me. 56.

²³ State Bank v. Seawell, 18 Ala. 616.

²⁴ Brown v. Burnham, 23 Me. 38. This and the preceding four illustrations are from Mr. Lawson's article in 28 Albany Law Journal, 284.

to continue solvent until the contrary is proved.²⁵ An action is brought on a promissory note, and it is proved that the maker was insolvent at its maturity. The presumption is that he was insolvent when the action was brought.²⁶

§ 58h (52, 53, 54). **Same—As to infancy, celibacy, childlessness.**—While there is a presumption of law that a party commencing an action is of full age and entitled to maintain the action in his own name, yet where the whole cause of action is based upon an act done by the plaintiff during infancy, such as to cancel a deed executed during his minority, and there is no allegation that he has attained his majority before commencing his action, since the nature of the relief he seeks requires him, after he appears in court to prove his infancy at the time of making the deed, the presumption is that such condition continues until the plaintiff himself negatives it.²⁷ In a settlement case it is proved that a son is over age. It is nevertheless presumed that he continues unemancipated as in the days of his infancy, unless there is evidence to the contrary.²⁸ There is ordinarily no presumption of law or

²⁵ Walrod v. Ball, 9 Barb. (N. Y.) 271.

²⁶ Mullen v. Pryor, 12 Mo. 307. There is a reconcilable conflict between this and the case cited immediately prior. In that case we find that an admission of insolvency at a given time is no evidence of insolvency at any *considerable* time afterward: Hume v. Long, 6 T. B. Mon. (Ky.) 116, 119; whereas in Mullen v. Pryor, *supra*, the court said that when a plaintiff shows a state of insolvency at a time when he is bound to sue, that state of things will be presumed to continue until the contrary is shown. In Donahue v. Coleman, 49 Conn. 464, it was said: "It is a general rule that a personal relation or an existing state of things, when once established by proof, is presumed to continue till the con-

trary appears. But the presumption is merely one of fact, and its effect depends upon the extent to which the quality of permanency enters into the nature of the matter in question. For this reason such a presumption must in some cases be confined to a limited period. Thus where a debtor went into bankruptcy at a certain date, the inference of continued bankruptcy five months afterward would be slight; but it would be legitimate evidence to be weighed by the jury. And in the absence of all evidence on the subject, this presumption, though slight, would be controlling." See, also, Body v. Jewsen, 33 Wis. 402.

²⁷ Irvine v. Irvine, 5 Minn. 61.

²⁸ Reg. v. Lilleshall, 7 Q. B. 158. 115 Eng. Reprint, 448.

of fact that a man or a woman is single, nor any presumption to the contrary,²⁹ nor any presumption of childlessness.³⁰

§ 58i (52, 53, 54). **Same—As to copartnership.**—Just as copartnership is presumed from the acts of parties conducting business together,³¹ so the continuance of the condition is assumed until the contrary is shown. A partnership brings an action on a note; it is contended that the plaintiffs are not partners. It is proved that three years previous they were partners. “The evidence of a joint interest in the plaintiffs was sufficient *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with them as partners and had settled with them as such some two or three years since. There was

²⁹ Bennett v. State, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919; Johnson v. Johnson, 170 Mo. 34, 59 L. R. A. 748, 70 S. W. 241; Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 8 L. R. A. 591, 24 N. E. 195. In Gibson v. Brown, 214 Ill. 330, 73 N. E. 578, a vendor executed a deed which recited he was a bachelor, and a question having arisen as to whether he was a bachelor when he executed a deed four years earlier, the presumption was held to have arisen that he was. In Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600, however, there is a strong expression the other way. In that case the court said: “This is an indictment for fornication, brought here by writ of error. In his argument before this court the counsel for the plaintiff in error relied upon two points. The first of these was the omission of the state to prove that the complaining witness was a single woman. This exception is not tenable. The indictment, it is true, charges that the person with whom the defendant committed fornication was a single

woman. The single state is, however, the natural, and, during early life, the only possible one; nor is there any period at which it is necessarily terminated or merged into marriage. In the absence, therefore, of testimony tending to the contrary, the presumption is that the celibacy which existed during puellescence continues. Therefore, until drawn into actual question, no affirmative testimony on this point was required from the prosecution.” In our opinion this is bad law, as it overrides the presumption of innocence with that of celibacy.

³⁰ Still v. Hutto, 48 S. C. 415, 26 S. E. 713; Hays v. Tribble, 3 B. Mon. (Ky.) 106; Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698. Nor is there any presumption that the parties to a suit are under disability: Gunter v. Hinson, 161 Ala. 536, 50 South. 86; nor as to the age at which a woman is past child-bearing: Land Titles Act, Canada, R. S. O. 1887, c. 116, § 23; In re G., 21 Ont. Rep. 109.

³¹ § 54, *ante*.

no evidence of any change or dissolution of partnership, and the presumption was that they were still partners.”³²

§ 58j (52, 53, 54). **Same—Authority to do an act.**—The presumption of the continuance of authority to perform acts applies generally to all agencies on the well-established rule of law, that a state of relations between parties once proved to exist is presumed to continue, until some change is shown to have occurred.³³ The authority of a minor son to bind his father by contract was shown to exist in 1845. A year later the son makes another contract with the same person and this second contract the father contested. The presumption of the continuance of the authority rendered the father liable.³⁴

§ 58k (52, 53, 54). **Same—Other relations of persons or things.**—The continuance of a state of peace in a country, or a state of war, and the continuance in force of public treaties, are presumed.³⁵ And a state of government once proved to exist is presumed to continue until the contrary is shown.³⁶ So a corporation once proved to exist is presumed to continue until the contrary is shown.³⁷ When personal property is shown to be the property of a party prior to his death, the law presumes in the absence of any evidence to the contrary, that it continued to be his up to the time of his death.³⁸ When the habits and character of persons have been in issue, the rule has been applied. It is doubtless true that sudden and marked changes sometimes take place in the character and habits of individuals, but it is equally true that such sudden changes are not in

³² *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; and see *Anderson v. Clay*, 1 Stark. 405; *Clark v. Alexander*, 8 Scott N. R. 161; *Cox v. Willoughby*, L. R. 13 Ch. Div. 863.

³³ 1 Greenl. Ev., 15th ed., § 41; *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 1 L. R. A., N. S., 891, 104 N. W. 997; *Ryan v. Sams*, 12 Q. B. 460; *Body v. Jewsen*, 33 Wis. 402; *Eames v. Eames*, 41 N. H. 177.

³⁴ *McKenzie v. Stevens*, 19 Ala. 691.

³⁵ *People v. McLeod*, 1 Hill (N. Y.), 377, 37 Am. Dec. 328; *Covert v. Gray*, 34 How. Pr. (N. Y.) 450.

³⁶ *Gelston v. Hoyt*, 1 Johns. Ch. (N. Y.) 543.

³⁷ *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

³⁸ *Hanson v. Chiatovich*, 13 Nev. 395.

the common course of experience; they are so exceptional as not to interfere with the general presumption that the character, habits and opinions of a person continue the same.³⁹ This rule has even been applied where two persons were shown to have sustained illicit relations with each other. Said Chancellor Walworth: "When it is once established that an adulterous intercourse has commenced between parties and they are found living together under circumstances which would induce every unprejudiced mind to conclude their inclination had not changed, the fair presumption is that the illicit intercourse is still continued."⁴⁰ The same rule was applied where one was proved at a given time to have been a gambler;⁴¹ where bad character for truth and veracity had been shown,⁴² or where deliberate malice had been proved.⁴³ Among other relations of persons and things to which the presumption of continuance has been applied are the matrimonial state and the general course of business. These are appended in the notes, together with such others as have formed the subject matter of decision.⁴⁴

§ 59 (55). Presumptions as to sanity and insanity.—Every man is presumed, in the first instance, to be sane, and the burden of proving insanity is upon him who asserts it. But insanity (that is, chronic or general insanity) having been once established, it will be presumed to continue until

³⁹ *Smith v. Smith*, 4 Paige Ch. (N. Y.), 432, 27 Am. Dec. 75; *Cargile v. Wood*, 63 Mo. 501; *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *Hunt's Appeal*, 86 Pa. 294; *Appeal of Reading Ins. Co.*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60.

⁴⁰ See cases last cited. See, also, *Prince v. Edwards* (Ala.), 57 South. 714.

⁴¹ *McMahon v. Harrison*, 6 N. Y. 443.

⁴² *Sleeper v. Van Middlesworth*, 4 Denio (N. Y.), 431; *Lun v. State*, 11 Tex. App. 483. But see *Wood v. Matthews*, 73 Mo. 482.

⁴³ *State v. Johnson*, 1 Ired. (N. C.), 354, 35 Am. Dec. 742.

⁴⁴ *Public office*: *Rex v. Budd*, 5 Esp. 230; *matrimonial state*: *Page v. Findley*, 5 Tex. 391; *Erskine v. Davis*, 25 Ill. 251; *common law*: *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Krouse v. Krouse* (Ind. App.), 95 N. E. 262; *course of business*: *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65; *Ashe v. De Rossett*, 8 Jones (N. C.), 240; *Shove v. Wiley*, 18 Pick. (Mass.) 558; *Kershaw v. Wright*, 115 Mass. 361; *Vaughan v. Raleigh Ry. Co.*, 63 N. C. 11; *stockholder*: *Montgomery Plank Road Co.*

the contrary is shown, and the burden is then cast upon him who asserts a return to sanity.⁴⁵ That is to say, that every person, in the absence of any evidence on the subject, is presumed to be of sound mind,⁴⁶ and therefore to continue being of sound mind until the presumption is legally challenged. This is but the application of the rule that the ordinary mental condition is presumed to exist. Hence it follows that, if a state of chronic or general insanity is shown, the presumption of sanity is not only removed, but there arises the presumption that insanity continues;⁴⁷ and the burden of proof rests upon the one who claims that an act of such a person was during a lucid interval, to show that the lucid interval existed at the time of the act in question.⁴⁸ If monomania or insanity upon particular sub-

v. Webb, 27 Ala. 618; *reputation of dental college*: State v. Chittenden, 127 Wis. 468, 107 N. W. 500; continuation of *gas-main* in street where it was proved to have been laid: Fair v. Home Gas etc. Co., 15 Cal. App. 705, 115 Pac. 754; *lights burning*: MacRae v. Chelsea Fibre Mills, 145 App. Div. 588, 130 N. Y. Supp. 339; continuance of *tribal connection*: Cyr v. Walker, 29 Okl. 281, 116 Pac. 931. But there can be no presumption of the *prior existence* of a relation or *status* from proof of its present existence: Erskine v. Davis, 25 Ill. 251; Taylor v. Creswell, 45 Md. 422; Murdock v. State, 68 Ala. 567; State v. Dexter, 115 Iowa, 678, 87 N. W. 417. On the presumption of condonation of a servant's breach of duty, see note to Butterick Pub. Co. v. Whitcomb, 8 L. R. A., N. S., 1005.

⁴⁵ 1 Greenl. Ev., § 42; In re Knox's Will, 123 Iowa, 24, 98 N. W. 470.

⁴⁶ Howard v. Howard, 112 Va. 566, 72 S. E. 133; Sutton v. Sadler, 3 Com. B., N. S., 87; Perkins v. Perkins, 39 N. H. 163; Hall v. Warren, 9 Ves. Jr. 605, 32 Eng. Reprint, 138; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Stitzel v. Farley, 148 Ill. App. 635; Milehan v. Montagne, 148

Iowa, 476, 125 N. W. 664; Achey v. Stephens, 8 Ind. 411; Staples v. Wellington, 58 Me. 453; Hix v. Whittemore, 4 Met. (Mass.) 545; Taylor v. Creswell, 45 Md. 422. As to presumption of sanity and innocence, see § 103, *post*. As to burden of proof when insanity is in issue, see § 188, *post*. As to testamentary capacity, see § 189, *post*. See, also, the late cases: Johnston v. Johnston (Ala.), 57 South. 450; Wherry v. Latimer (Miss.), 60 South. 642.

⁴⁷ Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484, 11 South. 618; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; In re Osborn, 145 App. Div. 926, 130 N. Y. Supp. 406; Keely v. Moore, 196 U. S. 38, 49 L. Ed. 376, 25 Sup. Ct. Rep. 169; Cartwright v. Cartwright, 1 Phill. 90; Hall v. Warren, 9 Ves. Jr. 605, 32 Eng. Reprint, 738. See notes, Ford v. State, 35 L. R. A. 117; State v. Scott, 36 L. R. A. 721; Sims v. Sims, 40 L. R. A. 742; In re Brown, 4 Ann. Cas. 491.

⁴⁸ Ripley v. Babcock, 13 Wis. 425; Saxon v. Whitaker, 30 Ala. 237; Case of Cochran's Will, 1 T. B. Mon. (Ky.) 264, 15 Am. Dec. 116, and

jects is shown, such condition is presumed to continue when the sanity of the person as to these subjects is under inquiry.⁴⁹ If, however, the insanity is of a character likely to be merely temporary, as if it is the result of sudden or violent disease, there is no presumption of its continuance.⁵⁰ It has been said that the presumption that insanity existing at a certain time continues, does not arise until the nature of the insanity appears to be of the continuing kind, but this is clearly expressed too broadly.⁵¹ "If derangement or imbecility be proved at any particular period, it is presumed to continue until disproved unless the derangement was accidental, being caused by the violence of a disease."⁵² It is not, therefore, to be stated as an unqualified maxim of the law, "Once insane, presumed to be always insane," but

note; *Harden v. Hays*, 9 Pa. 151; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330. As to whether reasonableness of the act is evidence of a lucid interval, see note to *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. The presumption of continued insanity is, of course, rebuttable. In a recent case—*Davis v. Davis*, 24 S. D. 474, 124 N. W. 715—the position is clearly dealt with in the following extract from the opinion: "While it is true that the findings and judgment of the district court of Kansas only established the fact that on the 8th day of August, 1902, when the said Andrew J. Davis executed the deed to the defendant for the Kansas lands, he was insane, and presumptively the mental condition of said Andrew J. Davis continued the same up to the time he executed the deed to the defendant for the Dakota property, this presumption is rebuttable, and may be overcome by evidence on the part of the respondent satisfying the court that at the time he executed the deed on the 1st day of September, 1903, to the defendant, he had recovered his mental faculties, and was mentally com-

petent to execute the deed in controversy in this action."

⁴⁹ *Thornton v. Appleton*, 29 Me. 298.

⁵⁰ *Staples v. Wellington*, 58 Me. 453; *Cartwright v. Cartwright*, 1 Phill. 100; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *State v. Reddick*, 7 Kan. 151; *Carpenter v. Carpenter*, 8 Bush (Ky.), 283; *People v. Francis*, 38 Cal. 183; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837.

⁵¹ *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340. This was so stated in *Hallohan v. Rempe*, 66 Misc. Rep. 27, 120 N. Y. Supp. 901, and *Gardner v. Gardner*, *supra*, is cited as authority for it. That case, however, decided that "long-continued inebriety, although resulting in occasional insanity, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required where *general insanity* is proved on a question of *derisavit vel non*. Where the indulgence has produced *permanent derangement of mind*, it would be otherwise, *it seems*."

⁵² 1 *Gregal*, on Ev., § 42.

reference must be had to the peculiar circumstances connected with the insanity of the individual. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary.⁵³ Nor is there any presumption against the sanity of one who was formerly a lunatic, after a complete restoration to reason.⁵⁴ But if one has been under guardianship for insanity, it is presumptive evidence of such condition.⁵⁵ The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but, standing alone, it is insufficient to establish it. It is sometimes thoughtlessly said, if a man commits a high crime or takes his life, he was insane, was crazy. The fact that the man commits a high crime is not evidence of insanity, and the fact that he takes his life does not of itself overthrow the presumption of sanity.⁵⁶

§ 60 (56). Presumptions of continuance of life.—The respect paid to this presumption has a twofold source. In the first, and to us the more important, it is the foundation of the presumption of death dealt with in succeeding chapters, and in the second, its roots are so firmly imbedded in

⁵³ *Hix v. Whittemore*, *supra*; *Wright v. Wright*, 139 Mass. 177, 29 N. E. 380.

⁵⁴ *Snow v. Benton*, 28 Ill. 306.

⁵⁵ *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Severns v. Broffey*, 155 Ill. App. 10; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004. *In Re Deleglise's Will*, 142 Wis. 234, 125 N. W. 452, there had been an adjudication in 1905 of the testator's incompetency and a guardian was appointed. In August, 1907, the testator made a will and after the death it was contested and the record of the guardianship proceedings put in evidence. The court held that while the adjudication in the guard-

ianship proceeding was in no sense *res judicata* in this case, it was doubtless considered by the trial court as quite persuasive in its effect, and rightly so, inasmuch as there was no claim that the mental condition of the deceased had improved between 1905 and August, 1907. See, also, note to *In re Will of Van Houten*, 140 Am. St. Rep. 346.

⁵⁶ *Bitter v. Mutual Life Ins. Co.*, 69 Fed. 505; *Jarvis v. Connecticut Mut. Life Ins. Co.*, 5 Ins. L. J. 507, 6 Ins. L. J. 311, Fed. Cas. No. 7226; *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Ins. L. J. 444, 1 Flipp. 363, Fed. Cas. No. 9755. See note on "Suicide as Evidence of Insanity," to *Wilkinson v. Service*, Ann. Cas. 1912A, 44.

the soil of ancient law that it is permitted to remain, a monument to the learning of olden days, as well as a useful mark in the landscape of legal inquiry, to guide the many paths leading to questions in which the longevity of actors on the scene is involved. When a person is shown to have been living at a given time, the continuance of life will be presumed, until the contrary is proved or is to be inferred from the nature and circumstances of the case.⁵⁷ One of the cases⁵⁸ contains a luminous opinion of Circuit Justice Baldwin, and as it deals with the case of a deposition, taken twenty-two years previously, of a man then in bad health, and as it abounds with useful references, excerpts from it have been appended.⁵⁹ In numerous instances the courts

⁵⁷ In re Hall, 1 Wall. Jr. (U. S.) 85, Fed. Cas. No. 5924; Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 486; Wilson v. Hodges, 2 East, 313, 101 Eng. Reprint, 388; Chicago & A. R. Co. v. Keegan, 185 Ill. 70, 56 N. E. 1088; In re Hall, 1 Wall. Jr. (U. S.) 85, Fed. Cas. No. 5924 (true, even though person was in poor health).

⁵⁸ In re Hall, *supra*.

⁵⁹ "Supposing Hall's death to be proven, the same question arises here, as we find in Boudereau v. Montgomery (Fed. Cas. No. 1694). That decision is one which I had occasion to consider a good deal in a suit which came before me a few years ago. I then felt reluctant to overrule it; the same reluctance yet exists. I feel, that in the first place it is a precedent, and, yet more, that it is a precedent left to us by a judge of great learning, of the utmost patience, and largely endowed with that finest, rarest, last betrayed of the qualities of human intellect; I mean with good judgment. I can never dissent from my honored predecessor, Judge Washington, without diffidence, and without feeling that in such a case he is likely to be right and I am likely to be wrong. Still, it is not in

the nature of human minds to view everything in the same way; and where great principles are concerned, it may be obligatory on each to give utterance to his opinion." The learned justice then traced the history of the most important English cases from 1730 and the American cases from Strickland's Lessee v. Poole, 1 Dall. (U. S.) 14, 1 L. Ed. 17, decided in 1765, and then refused the application to use the deposition on the ground that there was no evidence that the deponent Hall was dead or that his deposition could not be had in a more regular way. He continued: "The life of a person once shown to exist is intended to continue till the contrary is proved, or is to be presumed from the nature of the case. Direct proof is not here offered. Are the facts which are shown sufficient to supply its place? The witness, if alive, is eighty years old; an age that we may admit is an advanced one; but is yet one to which life is occasionally, nay, not unfrequently, prolonged. The court cannot, therefore, presume, as of course, that Hall has not reached it. Lord Hale has indeed said that it shall be presumed life will not exceed ninety-nine years: Weale v. Lower, Poll. 55,

have refused, in the absence of proof, to assume the death of persons proved to have been alive at some former time, even after a long interval had passed, holding that in such cases the burden of proof rests with those who assert the

67, 86 Eng. Reprint, 509, and it may be inferred that a man, if of any age already, will not live eighty years besides. *Napper v. Sanders*, Hut. 118; *Keeble's Case*, Litt. 370. But Chief Baron Reynolds refused to presume a witness dead, who had been examined sixty years before; there having been no proper searches or inquiry made after him: *Benson v. Olive*, 2 Str. 920, 93 Eng. Reprint, 942. Neither does the circumstance that the witness was in bad health in 1822, infer, as necessary consequence, that he is now dead. The difficulty is here: that the expression 'bad health' is indeterminate. There are manifold sorts of bad health, and many degrees in most of them. Show me that Hall was the subject of some quick consuming disease, or of any specific malady at all, and you will change the case. Supposing that his bad health was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterwards; that depends entirely upon the nature of his disorder, and mode of treatment, and the vigor of his constitution. And the valetudinarian often prolongs an existence beyond him who, in the carelessness of health, may be suddenly cut down. In the case cited from 13 Vesey, the health was 'very bad' (the chancellor speaks of it as 'desperate'), and the man was to have been heard of in six months after he went away; several years before. The case from *Neville & Perry* goes only to show that the presumption of life or death is a question of fact entirely. With both cases I agree. Is the case essentially changed by the enquiries made at the

postoffice? This difficulty occurs: that there is nothing to show that Hall was a person likely to be known there; that he was in the habit of receiving letters, or that he was a person of any note or consequence. It is no presumption of law that the runners of the postoffice know, so as to answer at first inquiry, the name and residence of every person in a populous city. Remarks of a similar sort apply to the inference which would be drawn from the absence of the name from the directory. Indeed, in the insignificance of advanced old age, a man has generally ceased to make impression on the busy world, or to be enrolled in the register of its active concerns. It seems to me difficult to suppose that direct evidence cannot be given of a death which, if it has occurred, has occurred close to us, and since 1822. Or did Hall ever leave the place of his former residence? Let this fact be shown; and that his friends have not heard of him for seven years. Had he no friends? Let that fact be shown. The difficulty is, that the plaintiff don't show that he has made proper search or inquiry for Hall. Had he done this, and been unable to hear anything of the person, I should be of opinion to receive the testimony. But there is a meagerness about all this part of the case, which is unsatisfactory; to use no harsher adjective. It shuts up the access to presumption which would have otherwise been easy. The case is much like that of *Benson v. Olive*, already referred to. In short, I see nothing in any of the circumstances shown, nor in all of them together, which, in the absence of proper in-

death.⁶⁰ Thus, where a witness gave his deposition in 1682, the court held in 1732 that, in the absence of any proof to the contrary, the continuance of life would be presumed, and rejected the deposition.⁶¹ It has been said that the civil law presumed a person still living at a hundred years of age, and the common law does not stop much short of this.⁶² Indeed, it was solemnly asserted by the court of queen's bench that it could not judicially presume that a person alive in 1034 was not still living in 1826.⁶³ Of course the presumption of the continuance of life would not now be carried to any such absurd limit. By the decisions under the common law there is a specific length of time at the end of which the presumption of the continuance of life is held to cease. As we have seen, the courts will not presume that death has taken place, although, on the contrary presumption, the person must have reached an extreme old age. But the courts ought not to assume that which in view of the usual duration of human life is practically impossible.⁶⁴ Indeed, there seems to be a gradual trend toward a conclusion more consistent, and more consonant with the statutory presumption which will be dealt with in the next section. While the courts will perhaps be slow in countenancing the presumption after a lapse of time when in the ordinary course of nature, the party must have passed away, yet they adopt readily the reasonable presumption which necessarily flows from the knowledge that the allotted span is the fair average of life.⁶⁵

quiry, brings that weight and conclusiveness which ought to exist before you set aside a wise and deep-laid rule of law."

⁶⁰ *In re Tindall's Trust*, 30 Beav. 151, 54 Eng. Reprint, 846; *Hammond v. Inloes*, 4 Md. 138, a grantee of a patent of land was presumed to be living seventy-eight years after the date of the patent. See, also, *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142, where it appeared that the party whose death was in question in 1857 was a revolutionary soldier.

⁶¹ *Benson v. Olive*, 2 Str. 920, 93 Eng. Reprint, 942.

⁶² *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142. See note, 104 Am. St. Rep. 209.

⁶³ *Atkins v. Warrington*, 1 Chitty, Pl., 16th ed., *273.

⁶⁴ *Tayl. Ev.*, 10th ed., § 198.

⁶⁵ Thus under the civil law the death of an absentee who is less than one hundred years old is never presumed, but must be clearly shown as a fact: *Hayes v. Berwick*, 2 Mart., O. S. (La.), 138, 5 Am. Dec. 727; *Miller v. McElwee*, 12 La. Ann. 476;

§ 61 (57). **Presumptions of death after seven years' absence—Origin of the presumption.**—Among the many misconstrued and half-construed presumptions which are to be found in the older cases, that at the head of this section is easily first. We place it first, for the reason that nothing is more common in popular statement and belief than that if a man is absent for seven years the law presumes he is dead. Let us devote ourselves to the origin of the correct presumption and we shall see how the abbreviated form has caused the common error. Like all other rules, it took its shape from necessity—the necessity of settling property rights and very often status. As the courts had to resort to the presumption of the continuance of life, in the absence of direct proof of life or death, in order to settle important rights which were often involved, it became equally necessary to adopt some counter-presumption in classes of cases where the death of the person would in the ordinary course of events seem more probable than the continuance of life. Accordingly, in analogy to certain English statutes, the courts adopted the rule that “a person, shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not be-

Martinez v. Succession of Wives, 32 La. Ann. 305; Willett v. Andrews, 51 La. Ann. 486, 25 South. 391. The death of a person before the bringing of the suit may be presumed when it should be contrary to the ordinary course of nature, through lapse of time, that he should be living at that time, although it is not necessary to indulge any presumption of the period when death occurred, or up to which time life endured: Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698. Thus, a grantor in a deed will be presumed to be dead eighty years after its acknowledgment by him: Young v. Shulenberg, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135.

The maker of a power of attorney, though aged, is presumed to have been alive five years later, at the time of the execution of a deed in his name by his attorney in fact appointed under such: Chicago etc. R. R. Co. v. Keegan, 185 Ill. 70, 56 N. E. 1088. In the case of a judgment rendered by a court of a justice of the peace more than twenty-five years in the past, in the absence of proof that the defendant was dead at the time that the suit was brought and prosecuted to judgment, the presumption is that the defendant was living at that time, and not that he was dead: Willis v. Ruddock Cypress Co., 108 La. 255, 32 South. 386.

ing heard of without assuming his death.”⁶⁶ Thayer, in his usual thorough way, gives an interesting and instructive account⁶⁷ of the presumption, and fixes its application in its present form as of 1805, and that it appeared for the first time in the text-books in 1815 and was speedily followed by other eminent writers, ending in 1876 with Stephen.⁶⁸ “Here, then,” says Thayer, “in seventy years we find the rule about a seven years’ absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty; the particular period being fixed by reference to two legislative determinations, in specific cases of a like question; (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing from what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts.”

⁶⁶ Steph. Ev., art. 99; 1 Greenl. Ev., § 41; Doe d. George v. Jesson, 6 East, 80, 102 Eng. Reprint, 1217; In re Phene’s Trust, L. R. 5 Ch. App. 139; Nepean v. Doe d. Knight, 2 Mees. & W. 894; McMahon, v. McElroy, Ir. Rep. 5 Eq. 1; Hopewell v. De Pinna, 2 Camp. 113; Nepean v. Doe, 2 Mees. & W. 910; 2 Smith L. C. 584; Rex v. Harborne, 2 Adol. & El. 540, 111 Eng. Reprint, 209; Hyde Park v. Inhabitants of Canton, 130 Mass. 505; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Baden v. McKenney, 7 Mackey (D. C.), 268; Bank v. Trustees, 83 Ky. 219; Mutual Benefit Company’s Petition, 174 Pa. 1, 52 Am. St. Rep. 814, 34 Atl. 283; Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493. See extended note, Policeman’s Ben. Assn. v. Ryce, 104 Am. St. Rep. 198–213. See interesting account of history of the rule, Thayer, Prel. Ev. at Com. Law, p. 319.

⁶⁷ Thayer, Prel. Treat. Ev., p. 319. In the case of Doe d. George v. Jes-

son, 6 East, 80, 102 Eng. Reprint, 1217, Lord Ellenborough said: “As to the period when the brother might be supposed to have died, according to the statute, 19 Car. II, c. 6, with respect to leases dependent upon lives, and also according to the statute of bigamy (1 Jac. I, c. 2), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him.”

⁶⁸ 1 Phill. Ev., 2d ed., 152; Starkie, Ev., 1st ed., pt. IV, p. 458; 1 Greenl. Ev., § 41; 1 Taylor, Ev., 9th ed., § 200.

§ 61a (57). **Same—American development of the presumption.**—In this country the rule has generally been applied only to those who were *absentees from their home*; and it is thus stated in a Massachusetts case: "If a man leaves his home and goes into parts unknown and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume, therefore, that any one of those remaining in the place which he left has died."⁶⁹ It is not necessary, in order to raise this presumption, that the removal should be *beyond the seas* or even to a *distant state*;⁷⁰ but if one removes from his state to a fixed place of residence in another state, the fact that he has remained unheard of in the former state does not alone authorize the presumption.⁷¹ It need hardly be added that this is not a conclusive presumption. It is one of fact and is subject to be controlled by the facts of the case. It is one which varies in weight according to the circumstances.⁷² The presumption under discussion is an arbitrary one, rendered necessary on grounds of public policy in order that rights depending on the life or death of persons long absent and unheard of might be settled by some certain rule.⁷³ It is not enough to raise the presump-

⁶⁹ Hyde Park v. Canton, 130 Mass. 505; Stevens v. McNamara, 36 Me. 176, 58 Am. Dec. 740; Stinchfield v. Emerson, 52 Me. 465, 83 Am. Dec. 524; Winship v. Conner, 42 N. H. 341; Commonwealth v. Thompson, 6 Allen (Mass.), 591, 83 Am. Dec. 653.

⁷⁰ Winship v. Conner, 42 N. H. 341. In Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 279, there was no proof that the person had absented himself from the country of his residence, and hence his death could not be presumed.

⁷¹ McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455. If alive when last heard from at his new domicile, the presumption is that life continues: Francis v. Francis, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120.

⁷² In re Phene's Trust, L. R. 5 Ch. App. 139; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Hyde Park v. Canton, 130 Mass. 505. And see Faulkner's Admr. v. Williman, 13 Ky. Law Rep. 106, 16 S. W. 352. In the code states the presumption has been adopted in very short form that a person not heard from in seven years is dead: Cal. Code Civ. Proc., § 1693 (26). This statutory presumption can only arise if it is conceded or conclusively shown that the absentee *had left the state*, and had not returned for seven successive years: Bradley v. Modern Woodmen of America, 146 Mo. App. 428, 124 S. W. 69.

⁷³ Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

tion that the person has not been heard from for seven years. It is not only necessary to show this, but also to show his absence from home and that inquiry has been made at the place of residence of such person abroad, if he had any known fixed residence.⁷⁴ And this is so even though such residence is beyond the seas;⁷⁵ but no inquiry need be made at places merely visited.⁷⁶ The testimony as to the absentee being heard from is not confined to members of the family.⁷⁷ The presumption has been held to be raised by a woman testifying that her son disappeared from his home more than seven years previously and had not been heard of or from since and his absence was unexplained.⁷⁸ The law has been admirably summarized in a comparatively recent case.⁷⁹ It is well settled that where a person leaves home with the expectation of returning thereto within a short time, and he remains away, his absence being unexplained and unaccounted for, and

⁷⁴ *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455; *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524; *Thomas v. Thomas*, 16 Neb. 553, 20 N. W. 846; *Brown v. Jewett*, 18 N. H. 230; *Gray v. McDowell*, 6 Bush (Ky.), 475; *In re Creed*, 1 Drewry, 235. See, also, *Osborn v. Allen*, 26 N. J. L. 388; *Smith v. Smith*, 5 N. J. Eq. 484; *Wambough v. Schanek*, 2 N. J. L. 229; *Smith v. Smith*, 49 Ala. 156; *Stevens v. McNamara*, 36 Me. 176, 58 Am. Dec. 740; *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387. As to the necessity for inquiry in such cases, see note to *Miller v. Sovereign Camp*, 28 L. R. A., N. S., 178; as to the facts to be shown in connection with absence to establish the presumption of death, see notes to *Modern Woodmen v. Gerdorn*, 7 Ann. Cas. 573; *Renard v. Bennett*, 14 Ann. Cas. 242.

⁷⁵ *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455.

⁷⁶ *Winship v. Conner*, 42 N. H. 341.

⁷⁷ *Smith v. Combs*, 49 N. J. Eq. 420. In *Flynn v. Coffee*, 12 Allen (Mass.), 133, we find: "If the tenant (the defendant in a writ of dower) had heard from him as alive within seven years, the jury should have been allowed to consider the evidence of that fact. There is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree. In *Doe v. Deakin*, 4 Barn. & Ald. 433, 106 Eng. Reprint, 995, it was held that persons in the neighborhood, not of the family, might testify that the absent person had not been heard of by them. And if the defendant's husband had been heard of as living within seven years, though by persons not members of his family, it would certainly affect the presumption upon which she relied."

⁷⁸ *Farington v. Modern Woodmen of America*, 82 Kan. 841, 109 Pac. 187.

⁷⁹ *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084.

no intelligence is received concerning him, and his whereabouts cannot be ascertained, although diligent search and inquiry are made in the vicinity of his home and at such places as he would be likely to go, and from such persons as he would be likely to meet and know, and nothing is heard from or of him, his absence from his family and home continuing for the period of seven years, a presumption arises from these facts that he is dead, unless there are other facts and circumstances shown which will rebut and overcome such presumption of death.⁸⁰ The presumption is of course rebuttable if the absentee has been seen or heard from during the seven years.⁸¹ But it is not rebuttable on mere rumor. It must be evidence of a tangible nature;⁸² such as a declaration of an intention to leave the home for some good reason.⁸³ In order to rebut it, it is

⁸⁰ *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028; *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Policemen's Benevolent Assn. v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764.

⁸¹ *O'Kelly v. Felker*, 71 Ga. 775 (the evidence is overwhelming that the defendant had been seen and heard from within seven years; and the presumption of his death was rebutted by sight of him, rumors about him, and a woman leaving with him, so as to alienate him from the old wife and children and the old home); *Smith v. Smith*, 49 Ala. 156 (presumption destroyed by the testimony of one disinterested witness that he was acquainted with the absentee and knew her handwriting and had received a letter from her within four years).

⁸² *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084.

⁸³ In *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428,

124 S. W. 69, there was testimony in the record which ought to have been submitted to the jury as tending to dispel the presumption. A witness said the insured declared five or six months before his departure that he had endured his family troubles as long as he could; and, if this testimony was true, it conduced to prove the thought was in his mind to abandon home and family; and later his discontent may have induced him to leave home ostensibly for a temporary purpose, but with a secret resolve not to return. That is to say, the presumption of death indulged because of his long absence from home and lack of information about him was rebuttable, and this evidence of unhappy domestic relations tended to rebut it; for such infelicity occasionally induces a husband and father to desert his family: *Dickens v. Miller*, 12 Mo. App. 403; *Carpenter v. Sup. Council*, 79 Mo. App. 597; *Winter v. Sup. Lodge*, 96 Mo. App. 1, 69 S. W. 662; *Biegler v. Sup. Council*, 57 Mo. App. 419; *Modern Woodmen v. Graber*, 128 Ill. App. 585, 588; *Garwood v. Hastings*, 38

not necessary to produce the testimony of persons who have seen him, or to produce letters from him. It is sufficient to produce evidence which shall satisfy the jury that he has been heard from within the seven years. Such evidence is usually and almost necessarily "hearsay." "It may be that if the evidence here offered had been admitted (a general report among the absentee's friends that he was living), the cross-examination would have shown it to have been mere vague rumor, and if so, unworthy of credit; but if there was such report and intelligence as to the absent man among his friends and former acquaintances, as was offered to be shown, the weight to be given it was for the jury.'"⁸⁴

§ 61b (57). Same—Return of absentee after expiry of seven years.—As we have said, the presumption of death is rebuttable, and no more physical rebuttal can be furnished than the presence of the alleged dead person, in which case all probate proceedings or other dealings with his property are as against him utterly void. By the great weight of authority, letters of administration may be attacked anywhere in any proceeding, if in fact the intestate is not dead; and the fact that the probate court found and that the record recites that the testator is dead is not conclusive, but is wholly immaterial. No administration can be had on the estate of a living person, and an attempted administration is void for all purposes.⁸⁵ The United States

Cal. 216, 229; *Bowden v. Henderson*, 2 Sm. & G. 360, 65 Eng. Reprint, 436; *Lawson*, Presumptive Evidence, rule 53, p. 294; *Greenl. Ev.*, § 278f.

⁸⁴ *Dowd v. Watson*, 105 N. C. 476, 18 Am. St. Rep. 920, 11 S. E. 589. As to when and under what circumstances the presumption of death arises, see note to *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 704-708. To rebut the presumption of death, the declarations of the supposed dead man's deceased wife that she received a letter from him after his departure is admissible; *Norris v. Edwards*, 90

N. C. 382, 47 Am. Rep. 526. Compare note to *Hoyt v. Newbold*, 46 Am. Rep. 761-772. And the question as to how much evidence is necessary to outweigh the presumption of death is for the jury to determine: *Tisdale v. Connecticut*, M. L. I. Co., 26 Iowa, 170, 96 Am. Dec. 136.

⁸⁵ *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal.

supreme court has reviewed at length the authorities upon the subject, and held that all proceedings of probate courts are dependent upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate. A court of probate must, indeed, inquire into and be satisfied of the fact of the

215, 68 Am. Dec. 237; Quidort v. Pergeaux, 18 N. J. Eq. 472; Springer v. Shavender, 116 N. C. 12, 47 Am. St. Rep. 791, 33 L. R. A. 772, 21 S. E. 397; Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; Griffith v. Frazier, 8 Cranch (U. S.), 9, 3 L. Ed. 471; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.), 87; Ross v. White, 7 Ired. (N. C.) 116; Melia v. Simmons, 45 Wis. 334, 30 Am. Rep. 746; D'Arusment v. Jones, 4 Lea, 251, 40 Am. Rep. 12; Stevenson v. Superior Court, 62 Cal. 60; Moore v. Smith, 11 Rich. (S. C.) 569, 73 Am. Dec. 122; Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458. Even those states which consider probate courts courts of general jurisdiction, and recognize the conclusive character of their acts and decrees in collateral proceedings, hold this to be one exception to the rule that probate decrees cannot be impeached collaterally by proof outside the record: Epping etc. Co. v. Robinson, 21 Fla. 36; Quidort v. Pergeaux, 18 N. J. Eq. 472. Chief Justice Marshall, in holding that administration granted on the estate of a living person was totally void, said, in Griffith v. Frazier, 8 Cranch, 9, 3 L. Ed. 471: "The ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue, yet

the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." This statement of Chief Justice Marshall has been quoted with approval in very many of the later cases. The theory upon which all these cases are decided is that where the testator is alive the court has no authority whatever to act at all. It cannot deliberate upon the question of life or death. As was said in Melia v. Simmons, 45 Wis. 334, 30 Am. Rep. 746: "There is no class of cases which embraces the administration of the estates of living persons, as if they were dead. The proceedings are void *ab initio* and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate, or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has, in respect to the administration of estates, is over the estates of dead persons."

death of the person whose will is sought to be proved, or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property.⁸⁶

§ 62 (58). No presumption that death occurred at a particular time.—It will easily be seen that if the presumption of death after seven years' unexplained absence is taken literally, some ambiguity will be found with reference to the time of death. For instance, the statutory period having elapsed, and the absentee presumed to be dead, the question often arises as to the date on which the death may be ascribed. It cannot be said at all till after the seven years that he is dead; when, then, shall the time be fixed—to the first day of the eighth year or when? In some of the cases the view is maintained that, if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be deemed in all legal proceedings to have lived during that period and to have died at its expiration; that the presumption of death which arises at the end of the seven years cannot act retrospectively, and that to this extent the time as well as the fact of the death are to be presumed.⁸⁷ But by the weight of authority, the presumption is only that the person is dead at the expiration of seven years, not that the death occurred at the end of that time or at any other particular time within that period. This is left to be determined as a matter of fact, according to the circumstances which may tend to satisfy the mind that it was at an earlier or later day.⁸⁸ "There-

⁸⁶ *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108. See, also, note to *Dobler v. Strobel*, in 81 Am. St. Rep. 535.

⁸⁷ *Clarke v. Canfield*, 15 N. J. Eq. 119; *Burr v. Sim*, 4 Whart. (Pa.) 150, 33 Am. Dec. 50; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec.

248; *Montgomery v. Bevans*, 1 Saw. (U. S.) 653, Fed. Cas. No. 9735; *Smith v. Knowlton*, 11 N. H. 191.

⁸⁸ *Nepean v. Doe d. Knight*, 2 Mees. & W. 894, 8 E. R. C. 512, and notes 544-553; *In re Phene's Trust*, L. R. 5 Ch. App. 139; *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086; *Spencer*

fore, if anyone has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life." This reads to-day, law as sound as the day it was written.⁸⁹

§ 63 (59). When death may be inferred from an absence of less than seven years.—Although a person who has not been heard of after leaving his home for seven years is presumed to be dead, yet, as we have shown in the preceding section, the question as to when such presumed death occurred is to be determined from all the facts and circumstances in the case, there being no presumption either

v. Moore, 11 Ired. (N. C.) 160, 53 Am. Dec. 401; *Spencer v. Roper*, 13 Ired. (N. C.) 333; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455. See notes, *Policemen's Ben. Assn. v. Ryce*, 104 Am. St. Rep. 202-205; *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A., N. S., 294.

⁸⁹ 1 Taylor on Ev., § 157. These views are in harmony with the settled law of the English courts: In *re Phene's Trust*, L. R. 5 Ch. App. 139; *Hopewell v. DePinna*, 2 Camp. (N. P.) 113; *Reg. v. Lumley*, L. R. 1 C. C. 196; In *re Lewes' Trusts*, L. R. 11 Eq. Cas. 236; 32 L. J. Ch. 104; 40 L. J. Ch. 507; 29 L. J. Ch. 286; 37 L. J. Ch. 265. In the leading case in the court of exchequer, *Nepean v. Doe ex dem. Knight* (2 Mees. & W. 894), in error from the court of king's bench, Lord Denman, C. J., said: "We adopt the doctrine of the court of king's bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." To the same effect are Mr. Greenleaf and the preponderance of authority in this country: 1 Greenl. Ev., § 41; *Montgomery v. Bevans*, 1

Saw. 653, Fed. Cas. No. 9735; *Stevens v. McNamara*, 36 Me. 176, 58 Am. Dec. 740; *Smith v. Knowlton*, 11 N. H. 191; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *Loring v. Steineman*, 1 Met. (Mass.) 204; *McDowell v. Simpson*, 1 Houst. (Del.) 467; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Spurr v. Trimble*, 1 A. K. Marsh. (Ky.) 278; *Doe ex dem. Cofer v. Flanagan*, 1 Ga. 538; *Smith v. Smith*, 49 Ala. 156; *Primm v. Stewart*, 7 Tex. 178; *Gibbes v. Vincent*, 11 Rich. (S. C.) 323; *Hancock v. Am. Life Ins. Co.*, 62 Mo. 26, 121; *Stouvenel v. Stephens*, 2 Daly (N. Y.), 319; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 456; *Davie v. Briggs*, 97 U. S. 628, 634, 24 L. Ed. 1086. In three recent cases, in all of which the same association was defendant—*Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084; *Farrington v. Same*, 82 Kan. 841, 109 Pac. 187; *Bradley v. Same*, 146 Mo. App. 428, 124 S. W. 69—this subject has received direct attention, and has been so exhaustively dealt with as to make these cases a safe guide to the law as it stands at the present day.

of life or death at any particular time during the seven years.⁹⁰ If one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore. To raise the latter presumption, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct or positive, but it must be of such a character as to make it more probable that he died at a particular time than that he survived.⁹¹ Proof that a person, while living happily with his family and standing well in the community, left home stating that he was going in a boat on a hunting trip, that he had not been heard of two years later, that an empty boat with certain articles of personal property had been found a few days after his disappearance at the place to which he stated he was going, is not sufficient to raise a presumption of his death at the time of his disappearance, in the absence of evidence that the articles found belonged to him, or that he hired a boat and went in the direction of the place where the boat was found.⁹² There is no arbitrary rule as to the length of time of the continued absence of a person unheard of or from which will raise a presumption of his death. The legal presumption of death permitted by the common law after the absence and lapse of seven years unaccounted for is also allowable before the expiration of that period, if there is evidence tending to prove that death occurred at an earlier date, or showing a greater probability of death than life at the prior date.⁹³ Death, like any other fact, may be established by circumstantial evidence, when direct proof is not obtainable, and when

⁹⁰ *Whitely v. Equitable Life Ins. Co.*, 72 Wis. 170, 39 N. W. 369.

⁹¹ *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

⁹² *Martin v. Union Mutual Ins. Co.*, 13 Wash. 275, 43 Pac. 53.

⁹³ *Czech v. Bean*, 35 Misc. Rep. 729, 72 N. Y. Supp. 402; *Carpenter v. Supreme Council Legion of Honor*, 79 Mo. App. 597; *Waite v. Coaracy*, 45 Minn. 159, 47 N. W. 537; *Eagle*

v. Emmet, 4 Brad. Surr. (N. Y.) 117; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Whitely v. Equitable Life Assur. Soc.*, 72 Wis. 170, 176, 39 N. W. 369. See, also, note on "Presumption of Death," in 104 Am. St. Rep. 198, appended to *Policemen's Ben. Assn. v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764.

the absence of a person without tidings from him concurs with other attendant and supporting circumstances to produce the conviction that he is dead, such proof is all that can be required. It is not necessary that seven years or any specific period should elapse, to lay the foundation for such presumption, but it may be drawn on a shorter period, whenever the facts of the case warrant it.⁹⁴ For example, in case the person in question embarked on a vessel which was not heard of and which was long overdue, inquiries having been made at ports of departure and of destination;⁹⁵ and where within the time the absentee was known to be in a desperate state of health,⁹⁶ or where he was of grossly intemperate habits when last heard of.⁹⁷ So, also, where at some time during the period he has encountered a "specific peril,"⁹⁸ which means not the ordinary dangers of travel or of navigation, but some unusual and extraordinary danger.⁹⁹ The same rule applies where

⁹⁴ *Boyd v. New England etc. Life Ins. Co.*, 34 La. Ann. 848; *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550.

⁹⁵ *White v. Mann*, 26 Me. 363; *Watson v. King*, 1 Stark. 121; *In re Hutton*, 1 Curt. 595; *In re Cooke, Jr.* Rep. 5 Eq. 240; *Gerry v. Post*, 13 How. Pr. (N. Y.) 118; *In re Bishop*, 1 Swab. & T. 303; *Eagle's Case*, 3 Abb. Pr. (N. Y.) 218; *King v. Pad-dock*, 18 Johns. (N. Y.) 141.

⁹⁶ *Danby v. Danby*, 5 Jur., N. S., 54; *Webster v. Birchmore*, 13 Ves. 362, 33 Eng. Reprint, 329. But the phrase "bad health" is not specific enough to support the presumption: *In re Hall*, 1 Wall. Jr. (U. S.) 85, Fed. Cas. No. 5924.

⁹⁷ *Stouvenel v. Stephens*, 2 Daly (N. Y.), 319; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907.

⁹⁸ *Burr v. Sim*, 4 Whart. (Pa.) 150, 33 Am. Dec. 50.

⁹⁹ *In re Norris*, 1 Swab. & T. 6; *Watson v. King*, 1 Stark. 121. The perils to which one may be exposed and which will raise a presumption of death from his absence unheard

from for less than seven years most frequently arise, perhaps, from the perils of the sea. Thus, if, shortly after a vessel sails, a violent storm arose, the death of the captain of such vessel may be presumed to have occurred during the storm, after the lapse of three years without any tidings from such vessel, or any of the persons then aboard: *Gibbes v. Vincent*, 11 Rich. (S. C.) 323. And one on board a vessel under such circumstances is presumed to have lost his life at the time of the storm in which the vessel is presumed to have gone down or been destroyed: *Learned v. Corley*, 43 Miss. 688. If a commander of a vessel and his crew and passengers begin a voyage at sea and neither the vessel nor those who went in her are afterward heard of, the presumption arises, after the utmost limit of time for her to have completed the voyage and to have heard from all the commercial ports of the world if she had arrived, that the vessel has been lost and that all on board of her have perished. The

his domestic relations or necessities would have made it certain that, if alive within that period, he would have returned to or communicated with his home. Thus, the death of an absent person may be presumed in less than seven years from the date that he was last heard from, not only from evidence that he was exposed to peril which probably resulted in his death, but from other facts and circumstances tending to show such result, and in this connection evidence of character, habits, affections, attachments, prosperity, domestic relations, objects in life, and the like, making the abandonment of home and family improbable, and showing a want of all those motives supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard

presumption of death in such case does not rest upon the fact alone that the person in question has been absent and unheard from for a specific length of time, but also upon the fact that the vessel has not been heard from, and the question in such case is not whether it is not possible that the person may be alive, but whether the circumstances do not present so strong a probability of his death that a court should act thereon: *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550; *Gerry v. Post*, 13 How. Pr. 118; *King v. Paddock*, 18 Johns. (N. Y.) 141; *Oppenheim v. Wolf*, 3 Sand. Ch. (N. Y.) 571. If a person takes passage on a vessel and is shown when last seen on the voyage to be sick and despondent and leaning out through a "shutter" which opens on the water, and when the voyage is ended ineffectual search is made for him, while his belongings are found in his room, and he was not seen to go ashore at way ports and could not have landed unobserved, the facts are amply sufficient to show that he was brought in contact with a specific peril and to raise the presumption

that he met his death by drowning at the time when last seen: *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 122. If the person "whose death is in question went to sea, and nothing has been heard from the vessel in which he left or of those who went in her, the presumption, after a sufficient length of time has ensued, will be that the vessel was lost, and that all on board perished. The length of time that must elapse to create such presumption depends upon the nature of the voyage and of the navigation, and a court or a jury will be guided by the circumstances that are laid before them, in determining whether such presumption is warrantable or not": *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550. In such cases the presumption of death may arise in a much shorter time than seven years. Thus, if it takes a vessel four months ordinarily to make the voyage, and she is not heard from in seventeen months after her departure, it may be presumed that she is lost and that all on board of her have perished: *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550.

to the duration of such absence. If one who is studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time of his disappearance.¹⁰⁰ The same inference arises upon the production of letters testamentary issued upon his estate.¹ But where it is improbable that the absentee, even if alive, would or could have been heard of, or would or could have communicated with his home, the presumption of death will not attach even at the end of the seven years;² nor will it attach where in other judicial proceedings the absentee is recorded as having been alive after the lapse of the period of seven years.³

§ 64 (60). Presumption of survivorship in common disaster—Civil and statute law.—A marked difference existed between the rules or presumptions of the civil law and the common law for determining the relative times of death of two or more persons who perished in the same catastrophe. Among the civilians these questions have given rise to infinite discussion and refinement; it suffices without enumerating all the rules to state that by the civil law in such cases persons who by reason of age or sex or state of health were deemed best able to struggle for life were presumed to have been the survivors.⁴ *Some of the rules of the civil law, however, have been adopted in a modified form by code states, and although their interpretation has been so far limited in its application to cases of partition and in-*

¹⁰⁰ Tisdale v. Connecticut etc. Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; Northwestern Mut. Life Ins. Co. v. Stevens, 71 Fed. 258, 18 C. C. A. 107; Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460; In re Beasley, L. R. 7 Eq. 498; Hickman v. Upsall, L. R. 20 Eq. 139; Hancock v. American Life Ins. Co., 62 Mo. 26; Marden v. City of Boston, 155 Mass. 359, 29 N. E. 588.

¹ Newman v. Jenkins, 10 Pick. (Mass.) 515; French v. Frazier, 7 J. J. Marsh. (Ky.) 425.

² McMahon v. Elroy, Ir. Rep. 5 Eq. 1; Watson v. England, 14 Sim. 28, 60 Eng. Reprint, 266; Lakin v. Lakin, 34 Beav. 443, 55 Eng. Reprint, 707; In re Mileham's Trust, 15 Beav. 507, 51 Eng. Reprint, 507; Dowley v. Winfield, 14 Sim. 277, 60 Eng. Reprint, 365.

³ Keech v. Rinehart, 10 Pa. 240.

⁴ 1 Greenl. Ev., § 29. See notes, Policemen's Ben. Assn. v. Ryce, 104 Am. St. Rep. 210-213; State v. Johnson, 51 L. R. A. 69; St. John v. Andrews Institution, 14 Ann. Cas. 716.

heritance of property,⁵ there seems to be no valid reason why in those states in which they are adopted without qualification, they should not be applicable whenever and in whatever case the circumstances of rights arising from the death of commoriant persons call for them. Those generally adopted are, that when two persons perish in the same calamity, such as a wreck, a battle or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to the following rules: (a) If both of those who have perished were under the age of fifteen years, the older is presumed to have survived; (b) If both were above the age of sixty, the younger is presumed to have survived; (c) If one be under fifteen, and the other above sixty, the former is presumed to have survived; (d) If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same, then the older; (e) If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.⁶ It must always be borne in mind, however, that these statutory presumptions are only to be used where there are no particular circumstances upon which any other presumption may be framed.

§ 64a (60). Presumption of survivorship in common disaster—At common law.—At common law there is no

⁵ Robinson v. Gallier, 2 Woods, 178, Fed. Cas. No. 11,951; Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855; Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741. In Louisiana the home of Robinson v. Gallier, *supra*, the limitation, however, was by statute: "If several persons respectively entitled to inherit from one another happen to perish in the same event," etc. In California the rule was applied in a suit for partition, Hollister v. Cordero, *supra*. In Sanders v. Simcich, *supra*, it was held that when

both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of a probate court granting letters of administration upon her estate recites that she was "the surviving wife" of her husband. In a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence *aliunde* upon the question of survivorship.

⁶ Cal. Code Civ. Proc., § 1963 (40).

presumption of survivorship in case of persons who perish by a common disaster. In the absence of evidence from which survivorship can be determined, it will be presumed for the purpose of settling rights to property, that all persons, of whatever age or sex, perishing in a common disaster, die at the same time; as the common law does not, under any circumstances, even in the case where two or more perish by the same calamity, indulge in any presumptions of survivorship resting upon considerations of age or sex. Our courts have rejected this conjectural mode of arriving at a fact which, from its nature, must often remain uncertain, and upon the truth of which the title to large amounts of property often depends.⁷ The rule, supported by the weight of authority in England and in this country, is that, when the death of two or more persons results from a common disaster, the case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding of such survivorship, but in the absence of any such evidence the question of such survivorship is regarded as unascertainable, and in such cases the question is determined as if the death of all occurred at the same moment.^a This as-

⁷ *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 59 L. R. A. 653, 64 N. E. 1002; *Russell v. Hallett*, 23 Kan. 276; *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Stinde v. Goodrich*, 3 Redf. Surr. (N. Y.) 87; *Willbor's Petition*, 20 R. I. 126, 78 Am. St. Rep. 842, 51 L. R. A. 863, 37 Atl. 634; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385.

⁸ *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641, 69 S. W. 370, 58 L. R. A. 436; *Young Woman's Christian Home v. French*, 187 U. S. 401, 47 L. Ed. 233, 23 Sup. Ct. Rep. 184. Death caused by fire: *Will of Ehle*, 73 Wis. 445, 41 N. W. 627; by

shipwreck: *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Wing v. Angrave*, 8 H. L. Cas. 183, 11 Eng. Reprint, 397, 8 E. R. C. 519, and note, 552, 553; *Russell v. Hallett*, 23 Kan. 276; *Coye v. Leach*, 8 Met. (Mass.) 371, 41 Am. Dec. 523; where two persons were swept by the same wave into the sea: *Underwood v. Wing*, 4 De Gex, M. & G. 657; where a mother and her infant lost their lives in the same shipwreck: *Stinde v. Goodrich*, 3 Redf. (N. Y.) 87; where the whole family perished in the flood: *Cowman v. Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64; where three sisters perished in the same fire: *Petition of Wilbor*, 20 R. I. 126, 78 Am. St. Rep. 842, 51 L. R. A. 863, 37 Atl. 634.

sumption is accepted, not because the fact is proved, nor because there is any presumption to that effect, but because there is no evidence and no presumption to the contrary, and further, because the person asserting survivorship in such case, having the burden of proof and being unable to support his claim by evidence, necessarily fails.⁹ In other words, the fact of survivorship, like every other fact, must be proved by the party asserting it.¹⁰ Hence if there are any facts which throw light upon the question of survivorship and which tend to show that one person did survive others, the question becomes one of fact for the court or jury to determine under the general rules of evidence.¹¹ And where there is evidence from which fair inferences may be drawn in such cases, the courts are justified in considering all the circumstances of the disaster, however minute, and all the facts which throw light upon the situation of the parties and the probabilities of the case.¹² Where the question becomes one for the jury, by reason of the fact that one of the persons was seen in a place of greater safety than the others or known to be living after the others were supposed to be lost, the jury may consider all the circumstances of the case, including the differences in age, sex or health.¹³ Disparity of age may be considered in determining the question of survivorship as between an adult and an infant, or a person well stricken in years.¹⁴ And if several persons grown and infant perish in a fire, the probable origin thereof and the location of the bodies

⁹ See cases last cited.

¹⁰ See cases last cited above.

¹¹ *In re Phene's Trust*, L. R. 5 Ch. App. 139; *Underwood v. Wing*, 19 Beav. 459, 52 Eng. Reprint, 428; *Will of Abram Ehle*, 73 Wis. 445, 41 N. W. 627; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790.

¹² *Will of Ehle*, 73 Wis. 445, 41 N. W. 627. In this case several persons were burned in the same house in the night, and the court considered tes-

timony in detail in arriving at a conclusion. See, also, *Smith v. Croom*, 7 Fla. 81.

¹³ *Pell v. Ball*, 1 Cheves Eq. (S. C.) 99, a case of shipwreck; *Underwood v. Wing*, 19 Beav. 459, 52 Eng. Reprint, 428, where one of the survivors was last seen floating on a spar; *Broughton v. Randall*, Cro. Eliz. 503, 78 Eng. Reprint, 752, where two persons were executed at the same time.

¹⁴ *Coye v. Leach*, 8 Met. (Mass.) 371, 41 Am. Dec. 518.

when found may be considered as an aid in determining the question of survivorship.¹⁵ And the fact of such survivorship does not require any higher degree of proof than any other fact in a civil case.¹⁶ In the application of the presumption as to survivorship of commoriant persons, a large majority of the cases necessarily deal with the loss of husband and wife or parent and child. No special presumption obtained at the common law with regard to them, and some illustrations of the cases dealt with are appended.¹⁷

15 Will of Ehle, 73 Wis. 445, 41 N. W. 627.

16 Robinson v. Gallier, 2 Woods, 178, Fed. Cas. No. 11,951.

17 From the note to Holmes v. Clisby, 104 Am. St. Rep. 198, on the presumption of death, already referred to, and which dealt with the entire subject, we extract the cases where the commorients were related to each other. It is a general rule that if husband and wife are shown to have perished in the same casualty, nothing appearing to the contrary, there is no presumption of survivorship, but it is presumed that both died at the same moment: Kansas Pacific Ry. Co. v. Miller, 2 Colo. 445; Balder v. Middeke, 92 Ill. App. 227; Middeke v. Balder, 198 Ill. 590, 92 Am. St. Rep. 284, 59 L. R. A. 653, 64 N. E. 1002; Fuller v. Linzee, 135 Mass. 468. If husband and wife die together on the same night from an escape of gas in their room, there is, in the absence of evidence upon the point, no presumption that one survived the other: Southwell v. Gray, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. And in such case where a benefit certificate of insurance provides that it shall be paid to the heirs of the deceased member, in case the named beneficiary dies before the insured, and the wife of the member is named as beneficiary, the benefits must go to the heirs of the deceased

member, and not to the heirs of his wife: Middeke v. Balder, 198 Ill. 590, 92 Am. St. Rep. 284, 59 L. R. A. 653, 64 N. E. 1002; Southwell v. Gray, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. A different conclusion was reached in Cowman v. Rogers, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64, where it was held that there was no presumption of survivorship, but that in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representatives were entitled to the fund. It has also been held by an inferior court in New York that if husband and wife perish together at sea, and there is no evidence to authorize a different conclusion, it will be presumed that the husband survived the wife: Moehring v. Mitchell, 1 Barb. Ch. (N. Y.) 264. If a mother and her infant son perish in a common catastrophe, and there is no positive evidence as to which perished first, there is no presumption of survivorship, but it will be presumed that both perished at the same time: Stinde v. Goodrich, 3 Redf. Surr. (N. Y.) 87. The same presumption prevails as to mother and child, regardless of age or the sex of the child: Moehring v. Mitchell, 1 Barb. Ch. (N. Y.) 264; Russell v. Hallett, 23 Kan. 276; Cook v. Caswell, 81 Tex. 678, 17 S. W. 385. In case of a

§ 65 (61, 62). **Presumption of payment from lapse of time—Origin, nature and effect of the presumption.**—The origin of the presumption that after a great lapse of time a debt is paid must be attributed to the means of enforcing payment of debts generally. It must be conceded that until the creditor sought to enforce a claim, there existed no *raison d'être* for the promulgation of a rule which should prevent his recovery. Granted, also, that the means of recovery were by action at law, and that the judges were first called upon to consider the merits of the demand, their comments, their animadversion on stale claims presented, when perhaps witnesses were dead or had left the realm, when records were lost or destroyed, formed the germ of an arbitrary limitation which they felt called upon to place upon the right of action and recovery in such cases. It is said that by the common law there was no stated or fixed time for the bringing of actions. This law was always open; satisfaction was never presumed. In the progress of society, however, it was found necessary to supply this deficiency by statute and to compel men to prosecute their rights within a reasonable time, or to abandon them forever. Hence we find, from the reign of Henry I, a succession of statutes, narrowing the latitude of the common law in this respect, and limiting the time in which actions might be brought to shorter and shorter periods until they had brought it down, in most cases, to twenty years only, and in many to a still shorter time.¹⁸ Black-

mother aged sixty-nine years, her son-in-law, aged forty-five, and his two children, aged respectively ten and seven years of age, who all perished in the same shipwreck, there is no presumption of survivorship: *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; and if three sisters perish in the same calamity, no fact or circumstance appearing from which it may be inferred that either survived the other, the rights of succession to their estate are to be determined as if death occurred to all at the same moment: *Petition of Wilbor*, 20 R. L.

126, 78 Am. St. Rep. 842, 51 L. R. A. 863, 37 Atl. 634. No presumption of survivorship exists as between a father, seventy years of age, and his daughter, thirty-three years of age, each of whom perished in the same disaster. In the absence of all evidence of survivorship in such case, the presumption is that the death of each occurred at the same instant: *Coye v. Leach*, 8 Met. (Mass.) 371, 41 Am. Dec. 518.

¹⁸ For most of the historical data and general conclusions in this section, acknowledgment is made to the

stone tells us that the reasons upon which these statutes were founded were, first, because the law will not disturb an actual possession in favor of a claim which has been suffered to lie dormant for a long and unreasonable time; secondly, because it presumes that he who has for a long time had the undisturbed possession of either goods or lands, however wrongfully obtained at first, has either procured a lawful title or made satisfaction to the injured, otherwise he would have been sooner sued; and thirdly, because it judges that such limitations tend to the prevention of innumerable perjuries, the preservation of the public tranquility, and, what it values perhaps more than all, the suppression of contention and strife among men. Such famous judges as Hale, Holt and Mansfield were foremost in endeavoring to render certain that which they believed should be made certain—the period after which the creditor's right to recover an alleged claim should be disregarded.¹⁹ As statutes of limitation were from time to time enacted, judges both in the courts of law and chancery

opinion of Kirkpatrick, C. J., in *Buchanan v. Rowland*, 5 N. J. L. 845 (721).

¹⁹ Lord Hale is said to be the first who adventured upon this course; he was followed by Holt, and then came Lord Mansfield with still a bolder step, the judges in the chancery, in the meantime, keeping equal pace, if not even going beyond the courts of law. In the case of *The King v. Stevens*, one of the corporators of *St. Ives*, 1 Burr. 433, 97 Eng. Reprint, 388, Lord Mansfield said there was no direct and express limitation when a bond should be supposed to be satisfied; the general rule was, indeed, about twenty years, but it had been left to a jury upon eighteen. So, though there was no statute nor fixed rule of limitation as to the length of time which should quiet the possessors of these offices, yet they ought not to be disturbed after a great length of time. In the *Winchelsea Causes*, 4 Burr. 1962, 98 Eng.

Reprint, 22, the court said they had unanimously resolved that after twenty years' undisturbed possession of a corporate franchise they would grant no rule upon a corporator to show by what right he held. This resolution was founded, not on any express provision of the law, but in analogy to the rules established in other cases. By the statutes of limitation, they said, writs of *formedon* and entry into lands were confined to twenty years, writs of error were confined to twenty years, courts of equity did not allow the redemption of mortgages after twenty years, bonds which had lain dormant should be presumed to be paid after twenty years, ejections required proof of possession within twenty years, and so, leaning upon these cases, they extended the doctrine by analogy, without positive statute, to the case of a corporate franchise then depending before them: *Buchanan v. Rowland*, *supra*.

by a kind of judicial legislation gradually extended the principles involved in such statutes by analogy to cases which, though not within the letter, were yet within the spirit of the law. Although the courts recognized the principle that when a debt is shown to exist it should be presumed to continue until payment is shown, yet they held that the payment of a debt may be inferred or presumed from a failure to make demand for a long period of time, and from other circumstances apparently inconsistent with the continuance of the debt.²⁰ The rule that payment of debts may be presumed from the lapse of time is one of convenience and policy, the result of a necessary regard to the peace and security of society. The presumption of payment from a great lapse of time is founded upon the rational ground that a person naturally desires to possess and enjoy his own, and that an unexplained neglect to enforce an alleged right, for a long period, casts suspicion upon the existence of the right itself. This presumption may be fortified or rebutted by circumstances. The fact that a plaintiff during the period when he might have enforced his demand by suit, if he had one, was in indigent circumstances and needed the use of his means is a circumstance tending to fortify the presumption that the demand has been paid or otherwise satisfied.²¹ "Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome ex-

²⁰ *Buchanan v. Rowland*, 5 N. J. L. 721. For a discussion of the general subject, see notes to *Alston v. Hawkins*, 18 Am. St. Rep. 879-888, and *Dixon v. Gourdin*, 1 L. R. A. 628, of the payment of a mortgage, *Kellogg v. Dickinson*, 1 L. R. A. 346, and of a judgment, *Beekman v.*

Hamlin, 10 L. R. A. 454. See, also, cases cited hereafter.

²¹ *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; see *Whart. Ev.*, § 1363; *Ross v. Darby*, 4 Munf. (Va.) 428; *Miller v. Smith's Exrs.*, 16 Wend. (N. Y.) 425; *Waddell v. El-mendorf*, 10 N. Y. 170.

tent. Hence, statutes of limitation have been enacted in all civilized communities, and in cases not within them, prescription or presumption is called in as an auxiliary to the administration of justice. Courts of equity consider it mischievous to encourage claims founded on transactions that took place at a remote period. They therefore grant no relief after a great length of time. In a word, the most solemn muniments are presumed to exist in order to support long possession; the most solemn of human obligations lose their binding efficacy and are presumed to be discharged after a lapse of many years."²² These and other considerations have led to a long line of decisions establishing the rule that, independently of any statute of limitations, a debt, which has been due and unclaimed and without recognition or the payment of interest for twenty years after becoming due, has been paid.²³ We shall now give illustrations of its application in relief of various forms of obligations.

§ 65a (61, 62). Same—Illustrations of application.—It has been held that a *judgment* should be presumed to be paid after twenty years, although an execution had been issued upon it, and a levy made on lands, and although proceedings upon the execution had been restrained.²⁴ A suit to revive a suit in equity founded on a judgment more

²² *Foulk v. Brown*, 2 Watts (Pa.), 209, 215; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153.

²³ *Brock v. Savage*, 31 Pa. 410; *Lyon v. Adde*, 63 Barb. (N. Y.) 89; *Jarvis v. Albro*, 67 Me. 310; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Peter's Appeal*, 106 Pa. 340; *Cowie v. Fisher*, 45 Mich. 629, 8 N. W. 586; *Manning v. Meredith*, 69 Iowa, 430, 29 N. W. 336; *Willingham v. Chick*, 14 S. C. 93; *Lynde v. Dennison*, 3 Conn. 391; *Ludlow v. Van Camp*, 7 N. J. L. 113, 11 Am. Dec. 529; *Clark v. Clement*, 33 N. H. 563; *Goodwyn v. Baldwin*, 59 Ala. 127; *Ray v. Pearce*, 84 N. C. 485; *Bellas v. Levan*, 4 Watts (Pa.), 294; *McCormick v. Evans*, 33 Ill.

327; *Lyon v. Odell*, 65 N. Y. 28; *Newcomb v. St. Peter's Church*, 2 Sand. Ch. (N. Y.) 636; *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647.

²⁴ *Buchanan v. Rowland*, 5 N. J. L. 845 (721*). In *Gulick v. Loder*, 1 Green (13 N. J. L.), 68, 23 Am. Dec. 711, the supreme court again, in an opinion by Ewing, C. J., approved of and affirmed this doctrine, and applied it in a suit upon a judgment obtained in Pennsylvania to which the New Jersey statute of limitations did not apply.

than twenty years old was dismissed, the judgment being presumed to be paid.²⁵ As to *bonds*, Lord Chancellor Talbot says²⁶ that after twenty years, and no interest paid during that time, a bond shall be presumed to be satisfied, unless something appears to answer for that length of time; and, after a verdict at law, he granted an injunction to stay proceedings.²⁷ In our own courts it has been held in a large number of cases in varying language that the presumption applies to bonds—that bonds appearing to be dated above twenty years before they are exhibited are to be presumed paid, and to be rejected unless the claimant shall give to the court satisfactory reasons to avoid the presumption.²⁸ As to *mortgages* the same rule is applied, that more than twenty years having elapsed since the maturity of the mortgage debt, the law presumes the mortgage satisfied, that is, of course, assuming that no claim has been made, no interest paid and no circumstances to explain the delay.²⁹ When the mortgagee is in possession, the right of the mortgagor will be barred in twenty years from the entry after breach of condition. So if the mortgagee suffers the mortgagor to remain in possession twenty years after breach of condition, payment is presumed. In both cases the time is reckoned from the breach of condi-

²⁵ Bird's Admr. v. Inslee's Exrs., 23 N. J. Eq. 363. See, also, Kinsler v. Holmes, 2 S. C. 483; Miller v. Smith's Exrs., 16 Wend. (N. Y.) 425; Chapman v. Loomis, 36 Conn. 459.

²⁶ Humphreys v. Humphreys, 3 P. Wms. 395, 24 Eng. Reprint, 1116.

²⁷ See, also, Searle v. Barrington, 2 Str. 813, 93 Eng. Reprint, 875. In an anonymous case (6 Mod. 22, 87 Eng. Reprint, 786), Holt, C. J., says: "If a bond be of twenty years' standing and no demand proved thereon or good cause shown for so long forbearance, upon *solvit ad diem*, I will intend it paid."

²⁸ Smith v. Benton, 15 Mo. 371; Durham v. Greenly, 2 Harr. (Del.) 124; Tinsley v. Anderson, 3 Call (Va.), 329; Shubrick v. Adams, 20

S. C. 49; Delany v. Robinson, 2 Whart. (Pa.) 503; Norvell v. Little, 79 Va. 141; Hale v. Pack's Ex., 10 W. Va. 145; Haskell v. Keen, 2 Nott & McC. (S. C.) 160; Cottle v. Payne, 3 Day (Conn.), 289, Fed. Cas. No. 3268; Levy v. Hampton, 1 McCord (S. C.), 145.

²⁹ Agnew v. Renwick, 27 S. C. 562, 4 S. E. 223; Bowie v. Poor School Society, 75 Va. 300; Pryor v. Wood, 31 Pa. 142; Inches v. Leonard, 12 Mass. 379; Jackson v. Wood, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; Sweetser v. Lowell, 33 Me. 446; Bamed v. Bamed, 21 N. J. Eq. 245; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 6 Am. St. Rep. 144, 1 L. R. A. 216, 15 Atl. 353; Delaney v. Brunette, 62 Wis. 615, 23 N. W. 22.

tion.³⁰ The presumption of payment also arises on *notes or other evidence of indebtedness not under seal* not paid within twenty years from maturity. Thus in an action on a note more than twenty years overdue, although the statute of limitations may not be a bar because of the maker's absence from the state, still there is a presumption of payment; and evidence that the holder was poor during that period is competent to fortify the presumption. The presumption of payment arising from lapse of time is the same, whether the debt is evidenced by bond or note, and arises after the lapse of twenty years, and not before, in the absence of evidence rebutting the presumption.³¹ The rule is the same as to *taxes*. They cannot have any higher character in this respect than debts due by specialty and of record. The assessment is in the nature of a judgment, and the warrant for the collection operates like an execution.³² The rule applies to *merchants' accounts*;³³ *accounts due upon covenant*;³⁴ *money due on contract for purchase of land*;³⁵ *recognizances in orphan's court*;³⁶ and *rents reserved in a perpetual lease or conveyance in fee*, but not a presumption that the covenant was released or discharged.³⁷ On the same general principle, it may be presumed that an *estate* has been duly distributed;³⁸ that an *administrator* was *qualified*;³⁹ or that he has made a settlement;⁴⁰ and when lands are conveyed to a *trustee* with which to pay debts, it will be presumed that he has paid them;⁴¹ but

³⁰ *Tripe v. Marcy*, 39 N. H. 439, 448; 2 Story's Eq. Jur., § 1028a, b; 2 Greenl. Cruise, 114, note.

³¹ *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; *Lash v. Von Neida*, 109 Pa. 207; *Clark v. Clement*, 33 N. H. 563; *Dickson v. Gourdin*, 26 S. C. 391, 2 S. E. 303.

³² *Hopkinton v. Springfield*, 12 N. H. 328; *Fisher v. Mayor of New York*, 6 Hun (N. Y.), 64; *Dalton v. Bethlehem*, 20 N. H. 505; *Andover v. Merrimack County*, 37 N. H. 437; *Elliott v. Williamson*, 11 Lea (Tenn.), 38.

³³ *Kingsland v. Roberts*, 2 Paige Ch. (N. Y.) 193.

³⁴ *Stockton's Admr. v. Johnson*, 6 B. Mon. (Ky.) 409.

³⁵ *Morrison v. Funk*, 23 Pa. 421; *McCormick v. Evans*, 33 Ill. 327.

³⁶ *Ankeny v. Penrose*, 18 Pa. 190.

³⁷ *Lyon v. Odell*, 65 N. Y. 28.

³⁸ *Hooper v. Howell*, 52 Ga. 315.

³⁹ *Battles v. Holley*, 6 Me. 145.

⁴⁰ *Austin v. Jordan*, 35 Ala. 642; *Gregg v. Bethca*, 6 Port. (Ala.) 9; *O'Brien v. Holland*, 3 Blackf. (Ind.) 490.

⁴¹ *Drysdale's Appeal*, 14 Pa. 531; *Webb v. Dean*, 21 Pa. 29; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481, 5 L. Ed. 311; *Coleman v. Lane*, 26 Ga. 515.

this is not so as against a legatee when the legacy is a lien on land.⁴² The presumption is also applicable to the case of a *covenant* for the delivery of property or performance of other like duties.⁴³ In the case of a debt payable by *installments*, the presumption applies to each installment as it falls due.⁴⁴

§ 66 (63). Lapse of time not a bar, but evidence to raise the presumption.—A sharp distinction must be drawn between the length of time which operates as a bar to a claim and that which is only used by way of evidence of payment. The former is conclusive, the latter presumptive—the former says the statute of limitation provides that this action may not be maintained after a certain number of years and therefore the plaintiff must fail; the latter says this is a stale claim, it is twenty years old, and before the plaintiff can succeed he must rebut the presumption of payment which the law raises. “A jury is concluded by length of time that operates as a bar: as, where the statute of limitation is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar: so in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances. For instance, there is no statute of limitations that bars an action upon a bond; but there is a time when a jury may presume the debt to be discharged: as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by showing the party not to have been in

⁴² *Williams v. Williams*, 82 Wis. 393, 52 N. W. 429.

⁴⁴ *State v. Lobb*, 3 Harr. (Del.) 421.

⁴³ *Phillips v. Morrison*, 3 Bibb (Ky.), 105, 6 Am. Dec. 638.

circumstances to pay, or a recent acknowledgment of the debt, the jury must say the contrary."⁴⁵ The statute may be pleaded in bar and is conclusive, though the debt is not paid; but the lapse of time only raises a presumption which may be repelled by other circumstances to be considered in arriving at the truth. This presumption, in the nature of a receipt written by the hand of time, may, however, be overcome by affirmative proof that the debt as a matter of fact has not been paid, and, when the presumption is overcome, the liability of the debtor continues. In this respect presumption of payment differs from the statute of limitations. The latter is an absolute bar to an action on a simple contract, even if the debt remains unpaid, and that bar is removed only by a new promise to pay or by an acknowledgment of the debt consistent with a promise to pay. But, while the presumption of payment after the lapse of twenty years may be rebutted, the evidence to rebut it must be satisfactory and convincing, and this is especially so when the suit is not brought until after the debtor's death.⁴⁶ When twenty years have elapsed since a debt became due, the jury ought to presume that it has been paid. In fact, the lapse of this period of time is sufficient *prima facie* evidence of payment, and it must be accepted by the court and jury unless there is other evidence to explain the delay and rebut the presumption.⁴⁷ Thus it will be seen that length of time is no positive bar, but that it is proper evidence to be left to the jury to aid

⁴⁵ Mayor of Kingston on Hull v. Horner, 1 Cowp. 102, 98 Eng. Reprint, 989, 993; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; Wanamaker v. Van Buskirk, 1 Saxt. Ch. (N. J. Eq.) 685, 23 Am. Dec. 748.

⁴⁶ Allen v. Everly, 24 Ohio St. 97; Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. Ed. 1002; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; Alston v. Hawkins, 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; Shields v. Pringle, 2 Bibb (Ky.), 387; Howland v. Shurtleff, 2

Met. (Mass.) 26, 35 Am. Dec. 384; Gregory v. Commonwealth, 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Wingett's Appeal, 122 Pa. 486, 15 Atl. 863; Fidelity Title & Trust Co. v. Chapman, 226 Pa. 312, 75 Atl. 428; Gulick v. Loder, 1 Green (N. J. L.), 68, 23 Am. Dec. 711; Jackson v. Pierce, 10 Johns. (N. Y.) 414.

⁴⁷ King's Ex. v. Coulter's Exr., 2 Grant Cas. (Pa.) 77; Cope v. Humphreys, 14 Serg. & R. (Pa.) 21; Brock v. Savage, 31 Pa. 410; Bellas v. Levan, 4 Watts (Pa.), 294; Tifghman v. Fisher, 9 Watts (Pa.) 442.

in deciding on the presumption.⁴⁸ This presumption of payment in reference to debts not embraced in the statute of limitations, although just as important, is not a presumption of law—one which the court itself may apply—but one of fact, which shifts the burden of proof. It *prima facie* obliterates the debt and shifts the burden of proof to the creditor, not to establish a new contract, as in a case where a debt is barred by the statute of limitations, but to show that payment of the debt has not been made.⁴⁹ It is one of those strong presumptions which from frequent occurrence has become familiar to the courts, and which being constantly recommended to juries, from motives of policy, has acquired an artificial force and become almost as important as a presumption of law. Although the court itself cannot make such a presumption, a new trial will usually be granted if a jury disregards it.⁵⁰

§ 67 (64). Mere lapse of time less than twenty years, not enough.—The presumption of payment after twenty years would seem, on the principle of *expressio unius, exclusio alterius*, to entirely exclude the proposition that a shorter period could, under any circumstances, suffice to raise it. That is not so, however, and the subject divides itself into the cases of periods exceeding twenty years, less than twenty years, and less than twenty years when there are other circumstances which, together with the lapse of time, are held sufficient to raise the presumption. But from lapse of time alone, this presumption can never arise, unless the full period of twenty years has expired. If a shorter period, even a single day less than twenty years, has elapsed,

⁴⁸ Lesley v. Nones, 7 Serg. & R. (Pa.) 410; Boardman v. DeForest, 5 Conn. 1; Pickering v. Stamford, 2 Ves. Jr. 272, 581, 30 Eng. Reprint, 629, 787; Jackson v. Sackett, 7 Wend. (N. Y.) 94; Stover and Barnes v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634.

⁴⁹ Stover and Barnes v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634; Yarnell v. Moore, 3 Cold. (Tenn.)

173; McQueen v. Fletcher, 4 Rich. Eq. (S. C.) 152; Courtney v. Staudenmeyer, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; Hart v. Goadby, 138 App. Div. 160, 123 N. Y. Supp. 166.

⁵⁰ Stover and Barnes v. Duren, *supra*.

the presumption of satisfaction does not arise. A lapse of time less than twenty years, in cases to which the statute does not apply, is only a circumstance which may, with others, afford proof of payment, but is of itself insufficient for the purpose.⁵¹ For example, the mere lapse of fourteen years since a debt became due, unconnected with pertinent circumstances proved, from which an inference of payment of the debt may be reasonably drawn, does not authorize a presumption of payment by a court or jury. Circumstances which cannot generate in the mind more than a mere suspicion that the debt has been paid, and which are so remote from the question in issue, as probably will confuse and mislead the mind instead of furnishing data, from which correct inferences may be drawn as to the truth, are not even admissible as evidence in connection with the lapse of time, when less than twenty years have elapsed since the bond or covenant became due, unless aided and strengthened by other circumstances pertinent and relevant, which together with them and the lapse of time, where considerable, may reasonably authorize the inference of payment.⁵² And when, by the expiration of the full period, the presumption of payment has acquired an artificial force, so that it stands in place of belief, even an admission that the payment has not been made cannot of itself destroy the effect which considerations of policy have given to a certain period of time.⁵³ The presumption raised from a definite time no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief, than the bar under the statute of limitations permits a near approach to the statutory period to avail; and a verdict found

⁵¹ *Calwell v. Prindle*, 11 W. Va. 307; *Thomas v. Hunnicutt*, 54 Ga. 337; *Lesley v. Nones*, 7 Serg. & R. (Pa.) 410.

⁵² *Calwell v. Prindle*, *supra*. See, also, *Husky v. Maples*, 2 Cold. (Tenn.) 25, 88 Am. Dec. 588, and note.

⁵³ In considering admissions which rebut this presumption, the same principles are applicable as in considering admissions to take a cause

of action out of the statute of limitations. *Stover and Barnes v. Duren*, 3 Strob. (S. C.) 448, 51 Am. Dec. 634. But it was held in *Levers v. Van Buskirk*, 7 Watts & S. (Pa.) 70, that it does not require so strong evidence to rebut the presumption of payment, arising after a lapse of twenty years, as it does to take a case out of the statute of limitations. See § 69, *post*.

in contravention of this principle will be set aside.⁵⁴ In estimating whether the twenty years have elapsed without payment, the time in which for any reason the creditor has no legal right to bring suit must be excluded.⁵⁵ The law gives to the lapse of time an artificial and technical weight beyond that which it would naturally have as a mere circumstance, bearing on the question of payment.⁵⁶

§ 67a (64). **Same—Illustrations.**—From the fact that where the period of lapsed time is less than twenty years, those having the burden of evidence invariably produce such concomitant matter as will bridge the gap, there is a paucity of decision right on the point. In regard to a *mortgage* it was held that no presumption arose from the lapse of nineteen years, or of a less time, particularly where for a part of the time the business of the courts was interfered with by war.⁵⁷ In the case of *notes* sued on seventeen years after the due date, it was held that the presumption of payment raised by the lapse of twenty years no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief than the bar under the statute of limitations permits a near approach to the statutory period to prevail; and a verdict found in contravention of the principle herein stated will be set aside.⁵⁸ The mere lapse of time, less than twenty years, between the rendition of a *judgment* and the commencement of the suit upon it raises no presumption that it has been paid.⁵⁹ In the

⁵⁴ *Smithpeter v. Ison's Admr.*, 4 Rich. (S. C.) 203, 53 Am. Dec. 732.

⁵⁵ *Criss v. Criss*, 28 W. Va. 388; *Mason v. Spurlock*, 4 Baxt. (Tenn.) 554; *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618; *Penrose v. King*, 1 Yeates (Pa.), 344.

⁵⁶ *Walker v. Wright*, 2 Jones (N. C.), 155.

⁵⁷ *Boon v. Pierpoint*, 28 N. J. Eq. 7; *Delaney v. Brunette*, 62 Wis. 615, 23 N. W. 22.

⁵⁸ *Smithpeter v. Ison's Admr.*, 4 Rich. (S. C.) 203, 53 Am. Dec. 732. See, also, *Criss v. Criss*, 28 W. Va.

388; *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618; *Penrose v. King*, 1 Yeates (Pa.), 344.

⁵⁹ *Ingraham v. Baldwin*, 9 N. Y. 45; *Miller v. Smith's Exrs.*, 16 Wend. (N. Y.) 425; *Daby v. Ericsson*, 45 N. Y. 786. In Tennessee, however, the unexplained lapse of sixteen years has been held to raise the presumption of payment: *Kilpatrick v. Brashear*, 10 Heisk. (Tenn.) 372; *Bender v. Montgomery*, 8 Lea (Tenn.), 586; *Anderson v. Settle*, 5 Sneed (Tenn.), 202; *McDaniel v. Goodall*, 2 Cold. (Tenn.) 391.

case of a *bond*, the application of the rule where the lapse is less than twenty years has been stringently withheld.⁶⁰ The presumption of payment of a *legacy* does not arise short of twenty years, unless aided by other circumstances. Seven years has been held insufficient.⁶¹

§ 68 (65). A less period than twenty years with other circumstances may suffice.—As we have already intimated in the immediately preceding sections while treating this subject with respect to the different kinds of indebtedness to which the presumption has been applied, it may be here stated, as a general rule, that though the law does not raise a presumption of payment short of twenty years from the time when the indebtedness falls due, still there is no doubt that a shorter period than that, aided by circumstances which contribute to strengthen such presumption, may furnish sufficient grounds to the jury for inferring the fact of payment, that is to say, a shorter time than twenty years may, in connection with other circumstances, warrant the inference that payment has been made.⁶² The law does

⁶⁰ *Sadler v. Kennedy*, 11 W. Va. 187; *Calwell v. Prindle*, 19 W. Va. 604.

⁶¹ *Strohm's Appeal*, 23 Pa. 351. See, also, notes, *Ingraham v. Bockius*, 11 Am. Dec. 732, *Richardson v. Richardson*, 30 Am. Dec. 544, *Nolen v. State*, 46 Am. Rep. 253, and the notes on the subject generally in 88 Am. Dec. 590, to the case of *Husky v. Maples*, 2 Cold. (Tenn.) 25; and in 18 Am. St. Rep. 879, to the case of *Alston v. Hawkins*, 105 N. C. 3, 11 S. E. 164.

⁶² *Fleming v. Rothwell*, 5 Harr. (Del.) 46; *Milledge v. Gardner*, 33 Ga. 397; *Garnier v. Renner*, 51 Ind. 372; *Davenport v. Labauve*, 5 La. Ann. 140; *Copley v. Edwards*, 5 La. Ann. 647; *Wooten v. Harrison*, 9 La. Ann. 234; *Henderson v. Lewis*, 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733; *Tilghman v. Fisher*, 9 Watts (Pa.), 44; *Diamond v. Tobias*, 12 Pa. 312; *Webb v. Dean*, 21 Pa. 29;

Hughes v. Hughes, 54 Pa. 240; *Brubaker's Admr. v. Taylor*, 76 Pa. 83; *Brigg's Appeal*, 93 Pa. 485; *Williams v. Sims*, 1 Rich. Eq. (S. C.) 53; *Blake v. Quash*, 3 McCord (S. C.), 205; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97; *Atkinson v. Dance*, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; *Calwell's Exr. v. Prindle's Admr.*, 19 W. Va. 604; *Danniston v. McKeen*, 2 McLean (U. S.), 253, Fed. Cas. No. 3803; *Colsell v. Budd*, 1 Camp. 27; *Moore v. Pogue*, 1 Duv. (Ky.) 327. In *King v. Coulter*, 2 Grant Cas. (Pa.) 77, the court said: "It was fifteen years, four months, and twenty-five days after the sealed note of the plaintiff's testator matured before this action was instituted for its recovery. No legal presumption of payment such as, unrebutted, the court would be bound to declare as a conclusion of law arose in that time; for the authorities all agree in fixing twenty years as the period

not and cannot define exactly what these circumstances shall be. The decision of the question must necessarily depend upon the facts of each case. Among the circumstances which may be given in reference to aid lapse of time in affording proof of payment are the character of the plaintiff for strictness in the collection of debts that are due to him;⁶³ the needy circumstances of the creditor, and the easy and solvent condition of the debtor.⁶⁴ When the time

necessary to such a presumption. But the question is, whether the time that did elapse was competent, in connection with such circumstances as were offered, to go to the jury as ground for their presuming payment of the note. The competency of such evidence does not depend on a particular period of years, though its effect will be proportioned to their number." This rule was applied in *Hughes v. Hughes*, 54 Pa. 240, where a debt from a son to his father was overdue eighteen years and three-fourths when suit was brought, and had been due over fifteen years during the lifetime of the obligor. To aid the presumption of payment from lapse of time, evidence was admitted to show the needy circumstances of the obligee, and the easy and solvent condition of the obligor. The court said: "Slight circumstances may be given in evidence for that purpose, in proportion as the presumption strengthens by the lapse of time; but still they must be such as aid the presumption arising from time. They must be, as it is said, persuasive that the time would not have been suffered to elapse had the debt remained unpaid." See to the same effect, *Wood v. Egan*, 39 La. Ann. 684, 2 South. 191.

⁶³ *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97.

⁶⁴ *Hughes v. Hughes*, 54 Pa. 240; *Livers v. Van Buskirk*, 4 Pa. 309; *Morrison v. Collins*, 127 Pa. 28, 14 Am. St. Rep. 827, 17 Atl. 753; *Bean*

v. Tonnele, 94 N. Y. 381, 46 Am. Rep. 153. Such evidence received to fortify the presumption after the lapse of twenty years; although it was rejected in *Daby v. Ericsson*, 45 N. Y. 786, but on other grounds. But proof of the easy circumstances of the debtor is undoubtedly irrelevant without proof of the needy circumstances of the creditor: *Morrison v. Collins*, 127 Pa. 28, 14 Am. St. Rep. 827, 17 Atl. 753. Where the complainant was in needy circumstances and knew of the sale of the property and insolvency of the purchaser soon after the sale and did not file her bill to enforce vendor's lien until twelve years after maturity of the debt, it was held that the presumption of payment arose: *May v. Wilkinson*, 76 Ala. 543. But the pecuniary situation of the parties is not enough: *Alexander v. Dutcher*, 7 Hun (N. Y.), 439. Other facts held relevant to this issue are that debtor and creditor had running accounts on which large payments were made, and that they lived near each other: *King's Exr. v. Coulter's Exr.*, 2 Grant Cas. (Pa.) 77; *Milledge v. Gardner*, 33 Ga. 397; as well as the fact that no demand of payment or attempt to enforce the claim has been made: *McDaniel v. Goodall*, 2 Cold. (Tenn.) 391; *Jacobs v. State*, 127 Ind. 77, 26 N. E. 675 (attorney services, no demand made for fourteen years); *Long v. Straus*, 124 Ind. 84, 24 N. E. 664 (delay of nearly twenty years in presenting a claim, with

has nearly elapsed, very slight circumstances may be received as relevant and left to the jury. Still they must be such circumstances as aid the inference arising from lapse of time; they must tend to show that the time would not have been suffered to elapse had the debt remained unpaid.⁶⁵ The probability of payment strengthens as the time approaches to twenty years, and the circumstances needed to establish it may be measured by the diminishing scale. The further the time stops short of twenty years the more cogent and decisive must be the circumstances relied upon. Just as the further the advance is beyond twenty years the more persuasive are the circumstances required to rebut the legal presumption. Twenty years assumed as the point for that presumption, the scale is reversed by which we measure the circumstances that tend to establish or counter-vail it. In both instances it is for the jury to apply the proofs under direction of the court. "If evidence be offered which in the judgment of the court will, in connection with the lapse of time reasonably tend to convince the jury that the debt has been paid short of twenty years, or that it has not been paid, notwithstanding that period, it is the duty of the court to receive it and to submit it to the jury with such instruction as shall enable them to estimate it at what it is really worth. The point to be attained is moral conviction of the fact; and whilst it is not to be founded on evidence insufficient to convince reasonable men, we are not to exact mathematical certainty, nor to expect more than moral demonstration."⁶⁶

§ 69 (66). The presumption—How rebutted.—Like every other disputable presumption, that of payment after twenty years may be rebutted, and we purpose showing what has been deemed sufficient to overcome it. Assuming the creditor has brought suit for his claim and then is raised the

other facts); *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265 (action on stock subscription).

⁶⁵ *Blackburn v. Squibb*, Peck (Tenn.), 60; *Hughes v. Hughes*, 54

Pa. 240; *Wood v. Egan*, 39 La. Ann. 684, 2 South. 191.

⁶⁶ *King v. Coulter*, 2 Grant Cas. (Pa.) 77. On the general subject of this section, see extended note to *Alston v. Hawkins*, 18 Am. St. Rep. 879 et seq.

presumption by reason of the age of the cause of action, the *onus* of proof still rests upon him to rebut the presumption, or he must fail in his action.⁶⁷ There is a great variety of facts which may be relevant to rebut this presumption, and it has been broadly declared that any facts and circumstances which render it more probable than otherwise that

⁶⁷ *Gregory v. Com.*, 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 413. On this general subject see note to *Alston v. Hawkins*, 18 Am. St. Rep. 887, 888. The following facts arising within the period required to raise the presumption have been received, to rebut it. *Part payment* of the debt at any time within the period required to raise the presumption of payment will rebut it; thus payment of interest on a bond by the principal will rebut the presumption of payment as well to the surety as to himself: *Dickson v. Gourdin*, 26 S. C. 391, 2 S. E. 303, 29 S. C. 343, 1 L. R. A. 628, 7 S. E. 510. So *payment on a bond* within the time required to raise the presumption of payment by the assignee in bankruptcy of one of the obligors repels the presumption arising from lapse of time: *Belo v. Spach*, 85 N. C. 122; *Hamlin v. Hamlin*, 3 Jones Eq. (N. C.) 191. *Notorious insolvency of debtor*: The presumption of payment arising from lapse of time may also be rebutted by showing the inability of the debtor to pay the debt because of his insolvency during all, or nearly all, the time since the indebtedness became due. In *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536, this rule was applied to the payment of a judgment, and the court said that "the indigent circumstances of a debtor, his hopeless insolvency and inability to pay his debts, are properly admissible in evidence for the purpose of repelling presumption of payment or satisfac-

tion, arising from lapse of time." To the same effect, *McLellan v. Crofton*, 6 Me. 307-334. Where the insolvency of the debtor is shown to have existed during the greater portion of the time, proof of a short interval of solvency, of which the creditor was ignorant, will not affect the rebuttal of the presumption of payment: *McKinder v. Littlejohn*, 1 Ired. (N. C.) 66, 4 Ired. (N. C.) 198. *The issuance and return of an execution nulla bona* is a circumstance rebutting the presumption of payment of a judgment from lapse of time: *Black v. Carpenter*, 3 Baxt. (Tenn.) 350. In North Carolina the insolvency must be shown to have existed during the entire statutory period: *Alston v. Hawkins*, 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; *Grant v. Burgwyn*, 84 N. C. 560. *The absence of debtor from the state*: *Daggett v. Tallman*, 8 Conn. 168; *McClellan v. Crofton*, 6 Me. 334; *absence of creditor*: *Fladong v. Winter*, 19 Ves. 197, 34 Eng. Reprint, 491; *Sheldon v. Heaton*, 88 Hun, 535, 34 N. Y. Supp. 856; *Helm v. Jones*, 3 Dana (Ky.), 86. See, also, *Cox v. Brower*, 114 N. C. 422, 19 S. E. 365; *the acknowledgment of the debt by the debtor*: *Eby v. Eby*, 5 Pa. 435; *Bissell v. Jaudon*, 16 Ohio St. 499; *Stout v. Levan*, 3 Pa. 235; *Murphy v. Coates*, 33 N. J. Eq. 424 (but not as a co-obligor: *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512). An admission of nonpayment may suffice though accompanied by a declaration that the debtor does not intend to pay: *Reed v. Reed*, 46 Pa. 239;

payment has not in fact been made, may be received. These facts should be such as will satisfy the minds of the jury on that subject, or, in other words, that whether the facts relied upon to rebut the presumption are true is a question of fact for the jury, but whether, if true, they are sufficient to rebut is for the court.⁶⁸ While the same precision of proof which is necessary to remove the bar of the statute of limitations is not required, yet the presumption of payment after twenty years is a strong one, binding alike upon court and jury until invalidated by proof. Hence the evidence to rebut the presumption should be satisfactory and convincing.⁶⁹ The presumption is not, like the statute of

recognition of debt and promise to pay: Tucker v. Baker, 94 N. C. 162; Roberts v. Smith, 21 S. C. 455; acknowledgment of bond thirteen years after maturity; *demands for payment:* Shields v. Pringle, 2 Bibb (Ky.), 387; Wanmaker v. Van Buskirk, 1 Saxt. Ch. (N. J. Eq.) 685, 23 Am. Dec. 748; *existence of war or other facts preventing creditor from bringing suit:* Hale v. Pack, 10 W. Va. 145; Jackson v. Pierce, 10 Johns. (N. Y.) 414; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; Dunlop v. Ball, 2 Cranch (U. S.), 184, 2 L. Ed. 246; Crooker v. Crooker, 49 Me. 416; circumstances making it inconvenient for the one to pay and the other to receive; *agreements extending time of payment:* Hale v. Pack, 10 W. Va. 145; *insanity of debtor:* McClellan v. Crofton, 6 Me. 334; *relationship of parties:* the near relation of the parties may repel the presumption; thus the situation of the parties, the mortgagor having married the daughter of the mortgagee, and had issue, is of itself sufficient to rebut the presumption. In other words, the fact that the parties interested were nearly related, and the collection of the money might have occasioned distress, and even the payment of interest inconvenience, taken in connection with

the fact that part of the money included in the mortgage was an advancement, and not to be repaid, is sufficient to repel the presumption of payment arising from the lapse of twenty years; Wanmaker v. Van Buskirk, 1 Saxt. Ch. (N. J. Eq.) 685, 23 Am. Dec. 748. See, also, cases collected in 8 Ency. of Ev., "Payment," p. 715.

⁶⁸ Fidelity Title & Trust Co. v. Chapman, 226 Pa. 312, 75 Atl. 428; Beale's Exrs. v. Kirk's Admr., 84 Pa. 415; Peter's Appeal, 106 Pa. 340; Porter v. Nelson, 121 Pa. 628, 15 Atl. 852; Buie v. Buie, 2 Ired. (N. C.) 87; Grantham v. Canaan, 38 N. H. 268; Wood v. Deen, 1 Ired. (N. C.) 230; Arden v. Arden, 1 Johns. Ch. (N. Y.) 313; Abbott v. Godfroy, 1 Mich. 178; Foulk v. Brown, 2 Watts (Pa.), 209; Sutphen v. Cushman, 35 Ill. 186; Knight v. Macomber, 55 Me. 132; Werborn v. Austin, 82 Ala. 498, 8 South. 280 (recognition of trust by trustee); Wemet v. Missisquoi Lime Co., 46 Vt. 458 (mistake in the acceptance of a security).

⁶⁹ Gregory v. Commonwealth, 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452. This is especially true if suit is not brought until after the death of the debtor. *It does not suffice merely to show that a former suit has been commenced or abandoned:*

limitations, a bar to an action on the original contract; therefore, a new promise is not necessary to sustain the suit. Any competent evidence which tends to show that the debt is in fact unpaid is admissible for that purpose. The evidence may consist of the defendant's admissions made to the creditor himself, or to his agent, or even to a

Palmer v. Dubois, 1 Mill's Const. (S. C.) 178 (suit on bond on which no interest had been paid for twenty-three years); or the poverty of the debtor: Rogers v. Judd, 5 Vt. 236, 26 Am. Dec. 301; or an indorsement of payment by the creditor without the privity of the debtor: Kirkpatrick v. Langphier, 1 Cranch C. C. 85, Fed. Cas. No. 7849; or to show, as against the executor, part payment on a bond, by one of the heirs: Blake v. Quash, 3 McCord (S. C.), 340; Burnside v. Donnon, 34 S. C. 289, 13 S. E. 465; or admission of nonpayment to a stranger: Gregory v. Commonwealth, 121 Pa. 611, 6 Am. St. Rep. 604, 15 Atl. 452; Bentley's Appeal, 99 Pa. 500. In a North Carolina case, in which the presumption of payment was raised, the creditor relied on the reputed insolvency of the debtor to repel the presumption. The debtor proved that he had the means and ability to pay the debt sued for during twelve or fifteen years before action, although he was not able to pay his other debts during that time, and this was held sufficient, on the authority of McKinder v. Littlejohn, 26 N. C. 198, that to repel the presumption the evidence must satisfy the jury that the obligor of the bond could not, and in point of fact did not, pay the bond. In the case of reputed insolvency referred to, Walker v. Wright, 47 N. C. 156, the case was put for the creditor that supposing that one owes ten debts of \$1,000, and has property only to the amount of \$1,000; if the fact of his

owning this property is sufficient to prevent the presumption of payment from being repelled when an action is brought by one of the ten creditors, it must be on the assumption that property of the value of \$1,000 has paid debts to the amount of \$10,000, which is impossible in the nature of things! To which the court replied: "Carry out the argument: One owes ten debts of \$1,000 each, and has property only to the value of \$9,000; if the fact of his owning this property is sufficient to prevent the presumption of payment from being repelled when an action is brought by one of the ten creditors, it must be on the assumption that property to the value of \$9,000 has paid debts to the amount of \$10,000, which is impossible in the nature of things! So the result is that to prevent the presumption of payment from being repelled there must be proof that the debtor had property enough to pay all his debts! This is absurd, and shows that the argument is fallacious. The fallacy is in this: It is not supposed that \$1,000 can in fact pay debts to the amount of \$10,000, or that \$9,000 can pay \$10,000, but when a creditor lets his debt stand for ten years, during all of which time nothing is said or done in regard to it, from public policy the law raises a presumption that it has been paid, and gives to the lapse of time an *artificial and technical* weight beyond that which it would naturally have as a mere circumstance bearing upon the question of payment."

stranger;⁷⁰ but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to a demand for the debt.⁷¹ It is of no consequence that the admission of non-payment is accompanied by a refusal to pay; the action is not founded on a new promise, but on the original indebtedness; the question, as against the presumption, is, whether or not the debt is in fact unpaid. The facts and circumstances relied on to rebut the presumption must necessarily be within twenty years before suit is brought, and, as the recollection of the exact words and import of an oral admission becomes more indistinct with the lapse of years, the force of such an admission will in general be lessened as the time from its occurrence increases. On the other hand, after twenty years the presumption will gather strength with each succeeding year, and the evidence to overthrow it must, of course, be correspondingly increased. After what lapse of time beyond twenty years, if ever, this presumption, which is disputable, will be conclusive has never been determined; and as the law now stands, each case must stand on its particular facts and circumstances. The rebuttal must be the more satisfactory and convincing when the suit is not brought until after the defendant's death; it must, according to the cases, carry conviction to the mind of the court, that if the facts alleged are true, the matters in issue are definitely and distinctly established. In such a case, the defendant stands upon a presumption of law which is binding alike upon the court and jury, until invalidated by proof; and the plaintiff, in rebuttal, upon a presumption of fact only, which must arise out of the evidence; whether or not the matters sought to be established are true is a question for the jury; but whether the facts and circumstances relied on, if true, would legitimately give rise to the presumption of fact referred to, is necessarily a question of law for the court.⁷²

⁷⁰ *Eby v. Eby*, 5 Pa. 435; *Morrison v. Funk*, 23 Pa. 423; *Reed v. Reed*, 46 Pa. 239.

⁷¹ *Bentley's Appeal*, 99 Pa. 500.

⁷² *Gregory v. Commonwealth*, 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452.

§ 70 (67). **Presumptions of payment from usual modes of business—Receipts.**—As a rule, the possession by the debtor of a receipt from his creditor is regarded by him, at all events, as conclusive evidence of payment.⁷³ But with the variation in form of the document, it has been found necessary to bring it within the rules or presumptions relating to the payment of money, which depend upon the known and usual modes of doing business recognized by the courts. Most receipts for money fall under one of three heads—receipts in full, receipts on account, and receipts which merely acknowledge payment of money without reference to its purpose or application; and they are all governed by one common rule, that a receipt *prima facie* imports exactly what it says, neither more nor less. If it specifies that it is “in full,” *prima facie* it is so; if “on account,” then *prima facie* more remains due, but with the right to either party to show in either case that it is erroneous; and lastly, when it acknowledges the receipt of money without further reference, it imports nothing more than that *prima facie* the amount mentioned in the document was paid by the one party and received by the other.⁷⁴ In the absence of any explanation showing for what a receipt purporting to be in full was given, it must be regarded as in full of

⁷³ Bish. Cont., § 176; *Obart v. Letson*, 17 N. J. L. 78, 34 Am. Dec. 182; *Marston v. Wilcox*, 2 Ill. 270. Such receipt may be in the form of an indorsement upon a note, order, check, account or written instrument: *Egg v. Barnett*, 3 Esp. 196; *Graves v. Moore*, 7 T. B. Mon. (Ky.) 341, 18 Am. Dec. 181; *Shropshire v. Long*, 68 Iowa, 537, 27 N. W. 737; *Harrison v. Harrison*, 9 Ala. 73; *Wooten v. Noll*, 18 Ga. 609; *Scruggs v. Bibb*, 33 Ala. 481. As to a receipt “in full of all claims,” see *Clark v. Simmons*, 4 Port. (Ala.) 14.

⁷⁴ *Bercier v. McInnis*, 57 Miss. 279. The plaintiff sold the defendants a lot of timber, receiving \$588.22 in payment therefor, or on account thereof, and signed the following

receipt: “Received, Scranton, Miss., Dec. 28, 1875, from Messrs. Bercier & De Smet five hundred and eighty-eight 22/100 dollars, for timber purchased.

“\$588 22/100 D. McINNIS.”

He subsequently brought this suit and recovered judgment for an alleged balance due to him. The testimony as to the amount of the timber and the mode of measurement differed, and the defendants asked the court to charge the jury that the law presumed *prima facie* that the receipt was in full of the price of the timber, and the court properly refused to instruct them that the law attached any other meaning to it than that which its language conveyed.

all unsettled demands up to its date.⁷⁵ A very frequent source of difficulty is that occasioned by receipts given for specified periods and amounts subsequent to an open account, as when work is done up to a given date, and payment therefor is not made, and the same parties enter into a subsequent contract for similar work which is paid for as it progresses and receipts given. There can be no inference or presumption of law from such facts or receipts that the original sum has been paid. Where the receipts are for specific sums each covering a given period of time, the circumstances of the receipt for services rendered subsequent to the original claim raise no presumption in favor of the debtor.⁷⁶ Evidence by the receipt of the payment of a current quarter's rent raises the presumption that all former quarter's rents have also been paid.⁷⁷ The familiar rule that *receipts are not conclusive* evidence of the matters which they recite, but are open to rebuttal or explanation, is elsewhere discussed.⁷⁸

§ 70a (67). Same—Possession by debtor of evidence of his debt.—When, in the course of dealing, a debtor gives security to his creditor for the payment of the debt in the shape of documentary evidence either alone or accompanying muniments of title, it follows that, on the payment of the debt, the document should no longer be allowed to remain in the creditor's custody; and hence has arisen the rule that possession by the debtor of the evidence of a debt, as a note, bond, bill or draft raises the presumption of payment.⁷⁹ The possession of an uncanceled note by the

⁷⁵ *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623. Where the parties had cross accounts, and one paid the other money, obtaining a receipt in full of all book accounts to a certain date, the presumption (in the absence of explanation) was warranted that the accounts on both sides were settled: *Alvord v. Baker*, 9 Wend. (N. Y.) 323.

⁷⁶ *Bougher v. Kimball*, 30 Mo. 193.

⁷⁷ *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Ottens v. Fred Krug*

Brewing Co., 58 Neb. 331, 78 N. W. 622; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.), 58.

⁷⁸ See § 491, *post*.

⁷⁹ *Potts v. Coleman*, 86 Ala. 94, 5 South. 780; *Star Loan Assn. v. Moore*, 4 Penne. (Del.) 308, 55 Atl. 946; *Tedens v. Schumers*, 112 Ill. 263 (possession of duebill by maker is *prima facie* evidence of payment); *Burrows v. Cook*, 17 Iowa, 436; *Callahan v. Bank of Kentucky*, 82 Ky.

debtor, under circumstances free from suspicion, is a strong circumstance in favor of payment, and should turn the scale if the other testimony on the issue of payment is conflicting and evenly balanced.⁸⁰ And so when a person produces an order upon himself signed by another for the delivery of

231; *Benson v. Shipp*, 5 Mart., N. S., 154; *Carroll v. Bowie*, 7 Gill (Md.), 34; *Ormsby v. Barr*, 21 Mich. 474; *McFall v. Dempsey*, 43 Mo. App. 369; *Peavey v. Hovey*, 16 Neb. 416, 20 N. W. 272; *Levy v. Merrill*, 52 How. Pr. (N.Y.) 360; *Allen v. Allen*, 114 N. C. 121, 19 S. E. 269; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Hays v. Samuels*, 55 Tex. 560; *Tedens v. Schumers*, 112 Ill. 263; *Chandler v. Davis*, 47 N. H. 462; *Callahan v. First National Bank*, 78 Ky. 604, 39 Am. Rep. 262; *Star Loan Assn. v. Moore*, 4 Penne. (Del.) 308, 55 Atl. 946. For the rule as to a draft, see *Connelly v. McKean*, 64 Pa. 113; *Birkey v. McMakin*, 64 Pa. 343; *Hayes v. Samuels*, 55 Tex. 560; *Lane v. Farmer*, 13 Ark. 63. For the rule as to an order, see *Zeigler v. Gray*, 12 Serg. & R. (Pa.) 42; *Kincaid v. Kincaid*, 8 Humph. (Tenn.) 17; *Raski v. Wise*, 56 Or. 72, 107 Pac. 984. For the rule as to a note, see *Dougherty v. Deeney*, 41 Iowa, 19; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Carroll v. Bowie*, 7 Gill (Md.), 34; *Stiger v. Bent*, 111 Ill. 328; *Potts v. Coleman*, 86 Ala. 94, 5 South. 780; *Hollenberg v. Lane*, 47 Ark. 394, 1 S. W. 687. In the case of *Heald v. Davis*, 11 Cush. (Mass.) 318, 59 Am. Dec. 147, where the only evidence offered in support of the plea of setoff was the production by the defendant of the note, the execution of which was admitted, the court said: "We do not question the correctness of the rule as stated in the cases of *McGee v. Prouty*, 9 Met. (Mass.) 547, 43 Am. Dec. 409, and *Baring v. Clark*, 19 Pick. (Mass.) 220, that when a promissory note or

bill of exchange has been negotiated, and afterward comes into possession of one of the parties liable to pay it, such possession is *prima facie* evidence of payment by him. 2 Greenl. Ev., § 27; *Smith v. Smith*, 15 N. H. 55; *Chandler v. Davis*, 47 N. H. 462; *Brady v. Brady*, 110 Md. 656, 73 Atl. 567; *Gray v. Tribune* (Tex. Civ. App.), 118 S. W. 808. The presumption does not apply to all notes, however. While the law presumes that a note in the hands of the maker, indorsed by the payee has been paid, the presumption does not apply if it was an accommodation note for the ordinary purpose of discount: *Callahan v. Bank of Kentucky*, 82 Ky. 231. When a debtor is the administrator of his creditor's estate, the doctrine of presumption of payment, in cases where a note is found in possession of the maker, free from circumstances calculated to excite suspicion, has no application: *Arnold v. Arnold*, 124 Ala. 550, 82 Am. St. Rep. 199, 27 South. 465. Neither does the presumption arise where the debtor had the means of obtaining possession of, or of canceling, the obligation other than by paying it: *Lawson*, Pres. Ev., rule 76; and where the maker has access to the papers of the holder, and may have acquired the note as well without payment as with, the presumption does not arise: 1 *Pothier on Obligations*, 573; *Grey v. Grey*, 47 N. Y. 552; *Grimes v. Hilliary*, 150 Ill. 141, 36 N. E. 977; *Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188; *Rogers v. McGuire*, 90 Hun, 455, 37 N. Y. Supp. 76.

⁸⁰ *Doty v. James*, 28 Wis. 319.

certain articles, the presumption is that such articles have been delivered.⁸¹ While the possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment, the force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment, or is a strong circumstance to prove payment.⁸² In the code states this presumption generally appears in the words "that an obligation delivered up to the debtor has been paid."⁸³ The general rule as to these presumptions being rebuttable applies with all its force to the one under consideration.⁸⁴

§ 71 (68). Same—Cancellation of instrument.—Thus far we have dealt only with the possession by the debtor of the obligation, undefaced and unaltered, for the purpose of showing its liquidation or discharge. The same presumption arises from the cancellation of a promissory note, check, or other instrument, as where the name of the maker is canceled or torn off, or where lines are drawn across its face,⁸⁵ or across the face of a mortgage.⁸⁶ "If a promissory note or bond should chance to be found in the hands of the debtor, or if it be crossed, rased or torn in pieces, either of these circumstances will create a presumption that it has been acquitted; which presumption will remain until clear proof be brought that the debt is still owing; as that the appearances came by violence or accident."⁸⁷ In the absence of evidence, an agent for collection who cancels

⁸¹ Greenl. on Ev., 33, 91, 114; Kincaid v. Kincaid, 8 Humph. (Tenn.) 17.

⁸² Smith v. Gardner, 36 Neb. 741, 55 N. W. 245; Larimore v. Wells, 29 Ohio St. 19.

⁸³ Cal. Code Civ. Proc., § 1963 (9).

⁸⁴ Allen v. Sawyer, 88 Ill. 414; Anderson v. Culver, 127 N. Y. 377, 28 N. E. 32.

⁸⁵ Waldrip v. Black, 74 Cal. 409, 16 Pac. 226; Gray v. Gray, 2 Laus. (N. Y.) 173; Peavey v. Hovey, 16

Neb. 416, 20 N. W. 272; Conway v. Case, 22 Ill. 127; Powell v. Swan, 5 Dana (Ky.), 1; Pitcher v. Patrick, 1 Stew. & P. (Ala.) 478; Lexington Bank v. Phenix Ins. Co., 74 Neb. 548, 104 N. W. 1146.

⁸⁶ Trenton Bank v. Woodruff, 2 N. J. Eq. 117.

⁸⁷ Cowen & Hill's Notes to Phil. on Ev., note 192; Parsons on Notes, and Bills, 235, 236; Gray v. Gray, *supra*.

the obligation of the debtor is presumed to have done so in consideration of the face amount of the claim.⁸⁸ Of course, this presumption may be rebutted by any competent proof that the cancellation was the result of a mistake or an accident, or that some effect was designed by it different from its ordinary import;⁸⁹ and the presumption does not arise at all if there is any ground for *suspicion that the cancellation is the act of the debtor*. Thus, where a son after the death of his father presented a canceled note which had been executed by the former, and it appeared that he had a key which fitted his father's desk and thus had access to the note, the court refused to presume that the note had been discharged.⁹⁰ The presumption is not overcome by showing payments by the maker to the payee without further showing that there were no other dealings between the parties upon which such payments might have been made.⁹¹ It will be noticed that there is a marked difference arising from the custody of the canceled instrument. If in the position of the debtor, it goes to strengthen the presumption of payment arising from his possession of the obligation.⁹² *A fortiori* the presumption is stronger when evidence of the partial destruction of the document evidencing the liability is added. It is no uncommon occurrence for the makers of negotiable paper, which has been paid and returned to them, either to tear it across or tear their name off, or when their bank has not canceled the signature and written "paid" across the face of the instrument, to do so themselves. When, however, the creditor assumes to support his claim by producing a document canceled or otherwise defaced, the debtor can no longer claim the benefit of the presumption of payment which would otherwise have arisen. "The fact that the promisor's name has been taken off a note affords strong presumptive evidence of its payment—if the note in that condition is in his possession; but if the note remains in the possession of the payee that fact

⁸⁸ Lexington Bank v. Phenix Ins. Co., 74 Neb. 548, 104 N. W. 1146.

⁸⁹ Pitcher v. Patrick, 1 Stew. & P. (Ala.) 478.

⁹⁰ Gray v. Gray, 47 N. Y. 553.

⁹¹ Somervail v. Gillies, 31 Wis.

152.

⁹² § 70a, *supra*.

repels the presumption.”⁹³ In another case,⁹⁴ on the second trial of an action of debt to recover the amount of a sealed note, the singular circumstance was presented that the note, which on the first trial was undefaced, bore on production at the second hearing two lines drawn with pen and ink transversely through its face, crossing each other, and extending over the entire instrument, including the names of the makers. The defense contended that no recovery could be had upon it, as the lines were evidence that the note was canceled or paid. In deciding against it, the court laid down a very clear rule of procedure. “It is clear the defendant can, at no time, exercise any legitimate power over the plaintiff’s evidence of debt, until it is surrendered to him. If, therefore, at any time before a final trial, the note or bond on which the action has been brought, undergo any alteration, or receive any impression, indicating its destruction or satisfaction, it would appear to be but a necessary and reasonable requisition on the plaintiff that he should afford the explanation. If the act done was the result of mistake or accident; or if any effect was designed by it

⁹³ Powell v. Swan’s Admr., 5 Dana (Ky.), 1. In that case the administrator of Swan sued Powell on a note made by Powell to Swan as payee. The mutilated note was exhibited with the affidavit of the deceased Swan that the note was unpaid. Powell filed a cross-bill alleging payment and usury and claiming an injunction. The opinion contains interesting matter from which the following is taken: “As it is customary for individuals when they pay off a note to take possession of it, and tear off their names, had Powell the possession of the note in the case before the court, it would create a strong presumption in favor of its having been discharged. But as it is unusual for notes that have been discharged to be left in the possession of the promisee, the fact of possession, in this case, by Swan, unaccounted for, or explained—espe-

cially when it is considered that a note may be, and often is, mutilated by casualty or design, in the hands of the promisee—repels the presumption of payment based on this fact. The possession of an acknowledged genuine note raises probably as strong, or stronger, presumption in favor of the possessor’s right to demand its payment, without the ability to account for its mutilation, as the fact of its mutilation will create in favor of its payment, without accounting for its possession with the promisee. If paid, it was probably lifted; and if lifted, how has it gotten back into the possession of Swan? As the burthen of proof lies on the payor, he should account for this circumstance. He has wholly failed to do so, or to show that he ever had possession of the note after its execution.”

⁹⁴ Pitcher v. Patrick, *supra*.

different from its ordinary import, he alone must be presumed to know the circumstances, and to possess the means of explanation." The facts, however, in such a case should go to the jury, both parties being allowed to explain the circumstances under which the alteration or cancellation was made.

§ 72 (69). **Same—Application of payments to debts first due.**—If a debtor owed on more than one account to the same creditor, and made a payment without indicating on which account such payment is made, questions arose as to which account he intended to pay or part pay, and, as very often nice questions of law were involved, the frequency of the position arising called for some definite rule of law to guide both parties to the transaction. The application by the debtor is a matter of expressed or necessarily implied intention, and the law implies such intention, where nothing is said on either side, and where it would have been most to the advantage of the debtor to have the amount paid applied to a particular account. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was actually the fact; it is, therefore, equivalent to an exercise of the party's right by acts, or an express declaration of intention. Where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption, for the same reason, that the payment was actually *received*, in the way that was most to the advantage of the creditor.⁹⁵ That is the first of several rules upon the subject, all of which are now well recognized. When payments are made by a debtor to one who is his creditor upon distinct trans-

⁹⁵ Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; Robinson v. Allison, 36 Ala. 525; Pope v.

Transparent Ice Co., 91 Va. 79, 20 S. E. 940; but see Tharp v. Feltz, 6 B. Mon. (Ky.) 6.

actions or for distinct amounts, and neither party makes an appropriation at the time, it is presumed that the payments are applied to the liabilities of earliest date.⁹⁶ A person indebted on separate and distinct accounts has the right to have his payments applied to such account as he shall direct. A creditor receiving the money with such direction is bound to give credit accordingly; but if a payment is made without direction as to its application, the creditor may apply it to any debt due him at the time from such debtor. It is not always necessary that a debtor expressly direct the application of a payment made to his creditor, and if from the circumstances his purpose may be clearly implied, the creditor is bound to regard it. When a creditor claims that his debtor owes him upon two separate demands, one of which is admitted and the other disputed, a payment made by the debtor will be presumed, in the absence of evidence, to be made upon the demand admitted, rather than upon the one disputed, at the time of making such payment. So, also, an undesignated payment will be applied to an interest-bearing demand, rather than to one not bearing interest.⁹⁷ If there are two different sums owing, and the debtor pays the exact amount of one of them, in the absence of any direction or special appropriation, the law raises the presumption of his intention to pay that claim which coincided with the amount paid. A check drawn to another's order, indorsed by the latter and paid, is presumptive evidence that its amount was paid to the payee on account of a debt shown to have existed at that

⁹⁶ *Winston v. Farrow* (Ala.), 40 South. 53; *Briggs v. Steele*, 91 Ark. 458, 121 S. W. 754; *Dulles v. De Forest*, 19 Conn. 190; *Fremont County v. Fremont County Bank*, 138 Iowa, 167, 115 N. W. 925; *Honeye v. Henkel*, 115 La. 1066, 40 South. 460; *Thurlow v. Gilmore*, 40 Me. 378 (where the payment was made by one of full age upon a running account which commenced during his infancy and ended after his majority); *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. Rep. 516, 17 Atl. 940; *Crompton*

v. Pratt, 105 Mass. 255; *Campbell Glass & Paint Co. v. Davis Page Planing Mill Co.*, 130 Mo. App. 474, 110 S. W. 24; *Bancroft v. Holton*, 59 N. H. 141; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; *Stanwix v. Leonard*, 125 App. Div. 299, 109 N. Y. Supp. 804; *Maloney v. Bartlett*, 172 Pa. 284, 33 Atl. 553; *Fisher v. Brown Hardware Co.*, 47 Tex. Civ. App. 58, 103 S. W. 655.

⁹⁷ *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

time, and the check cannot be excluded on the ground that it belongs to a different transaction, until the presumption is overcome by proof.⁹⁸ When, therefore, parties are dealing together in the sale and purchase of goods, some of which are prohibited by law, and the buyer pays money generally on account beyond the amount due for goods legally sold, the balance will be applied in payment for the goods illegally sold. It will not be presumed that it is designed as a payment in advance, for a legal debt to be afterward contracted.⁹⁹ It must always be borne in mind, however, that in the absence of any indicative circumstances or evidences of implied intention on the part of the debtor, the creditor has the right to appropriate the payment at his own discretion.¹⁰⁰ And if, of the two or more accounts, one is secured and the others are not, and if no appropriation was made by the parties, the law would apply it to the debt not secured, on the ground that, in the absence of any direction, the presumption would be that the creditor, having a right to choose to which it should be applied, would appropriate it in the mode most advantageous to him.¹ From the ordinary course of doing business it is improbable that *former rents* remain unpaid,

⁹⁸ *Masser v. Bowen*, 29 Pa. 128, 72 Am. Dec. 619; *Harvey v. Quick*, 9 Ind. 258.

⁹⁹ *Hall v. Clement*, 41 N. H. 166; *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *Backman v. Wright*, 1 Wms. (Vt.) 187, 65 Am. Dec. 187; *Bancroft v. Dumas*, 21 Vt. 456; *Harrison v. Johnston*, 27 Ala. 445; *Wright v. Laing*, 3 Barn. & C. 165, 107 Eng. Reprint, 695; *Ex parte Randleson*, 2 Deac. & Ch. 534; *Cruickshank v. Rose*, 5 Car. & P. 19; *Philpott v. Jones*, 2 Ad. & E. 41, 111 Eng. Reprint, 16; *Hammersley v. Knowles*, 2 Esp. 666.

¹⁰⁰ *Kissan v. Burrall*, Kirby's Rep. (Conn. 1787) 326.

¹ *Hare v. Stegall*, 60 Ill. 380. In *Coles v. Withers*, 33 Gratt. (Va.) 186, the whole subject is thoroughly dealt with by Staples, J. He says

(p. 204): "This rule is sustained by a uniform current of authorities all over the country. See cases cited in *Munger*, on the Application of Payments, 134; 1 American Leading Cases, 352-356. It has not been, however, always followed in this state, nor has it been expressly or impliedly repudiated. This court has repeatedly held, that no general rule applicable to every case, could be adopted and adhered to without producing great hardships. If neither party has made the application, the court will exercise a sound discretion, and make the application according to its own notions of what may be right and proper in the particular case: *Smith v. Lloyd*, 11 Leigh (Va.), 512, 37 Am. Dec. 621; and this rule is abundantly supported by authority. *Munger*, 81, 99."

when it appears that the last installment of rent has been paid; hence it is presumed when payment for a given quarter or other period is shown that all former rents are paid.² This presumption obtains as well where several persons are entitled to receive money as in an individual case, for they are all presumed to be conusant of their rights.³ And where a firm as well as one of its members is indebted to a common creditor and a payment is made by the indebted member of the firm, the presumption is that it is an individual payment applicable to the individual liability.⁴ The right of appropriation of payments, says Judge Story,⁵ is one strictly existing between the original parties, and no third person has any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor has made or required it.⁶ Even sureties enjoy in this particular no advantage over others.⁷

§ 73 (70). Settlement presumed from accepting note of debtor.—The appropriation of payments in regard to notes and bills has rules set specially apart for their treatment, and in considering the previous section the comments must be read in conjunction with this whenever the subject dealt

² Decker v. Livingston, 15 Johns. (N. Y.) 479; Attleborough v. Middleborough, 10 Pick. (Mass.) 378. See, also, Robbins v. Townsend, 20 Pick. (Mass.) 345; Best, Ev., § 406. In the code states it is a statutory disputable presumption that former rent or installments have been paid when a receipt for the later is produced: Cal. Code Civ. Proc., § 1963 (10). See, also, § 70, *ante*.

³ Decker v. Livingston, 15 Johns. (N. Y.) 479.

⁴ Brunson v. McLendon, 98 Ala. 568, 13 South. 523; Wells v. Ayers, 84 Va. 341, 5 S. E. 21.

⁵ Gordon v. Hobart, 2 Story, 243, Fed. Cas. No. 5608. See, also, cases cited, c. 9, p. 75 et seq., Munger on Application of Payments.

⁶ Coles v. Withers, *supra*.

⁷ The supreme court of Connecti-

cut, in the case of Bank v. Benedict, 15 Conn. 437, declares that: "A surety of a debtor has no voice in the appropriation of payments made by the debtor." "The debtor and creditor have the sole right of controlling the payment, and the doctrine that sureties will be favored in the construction and enforcement of contracts has no application in such a case. To do so would be to defeat the object and end of suretyship, and to hold that the surety might have the money which was paid by the debtor so applied as to leave the creditor a loser, notwithstanding his care and vigilance." And this seems to be the general current of judicial opinion: Pope v. Transparent Ice Co., 91 Va. 79, 20 S. E. 940, in which the application of payments is dealt with at length.

with refers to payment on or by such negotiable instruments. The first question has received an almost universally uniform answer. Does the acceptance of the debtor's promissory note or bill of exchange extinguish the original debt, or, in other words, is the note or bill to be deemed payment? It is held in some states that the acceptance of a negotiable note or bill of exchange by a creditor in consideration of a pre-existing debt is presumed to be a payment of such debt unless a contrary intention is shown;⁸ but by the great weight of authority, including the courts of England and the supreme court of the United States, it is held that such *acceptance of a note or bill is not presumed to discharge the debt*, and there must be an agree-

⁸ Ely v. James, 123 Mass. 36; Paine v. Dwinel, 53 Me. 52, 87 Am. Dec. 533; Mehlberg v. Tisher, 24 Wis. 607; Dickinson v. King, 28 Vt. 378; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 118; Tisdale v. Maxwell, 58 Ala. 40; Mason v. Douglas, 6 Ind. App. 558, 33 N. E. 1009. Mr. Justice Field in The Kimball (3 Wall. (U. S.) 37, 18 L. Ed. 50), thus refers to this proposition: "The rule in Massachusetts is an exception to the general law; but even there, as we have said, the presumption that the note was given in satisfaction of the debt may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact. Thus in Butts v. Dean, 2 Met. (Mass.) 76, 35 Am. Dec. 389, where a note was given for a debt secured by the bond of a third person, it was held that it was not to be presumed that the creditor intended to relinquish his security, and, therefore, the note was not to be deemed payment for the original debt. And following this and other like authorities of that state, Mr. Justice Sprague, of the United States district court, held

that a lien for materials furnished a vessel built in Massachusetts, a lien given in such a case by a law of that state, was not displaced or impaired by the creditors taking the notes of the debtor: Page v. Hubbard, 1 Sprague, 338, Fed. Cas. No. 10,663. And on like grounds, we think that any presumption of a discharge of the claim of a ship owner, and of his lien upon the cargo in this case, by his taking the notes of the charterers, is repelled and overthrown." The courts of Indiana, Louisiana, Maine, Massachusetts, and Vermont hold that the bill or note is presumptive evidence of payment. In Indiana it does not appear to have been so at all times: See Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341. Daniel (Negotiable Inst., § 1260), after alluding to this regrettable exception in the five states named, says: "But they admit parol evidence to rebut this presumption by proof of an express or implied contract that the debt should only be suspended, not discharged. And when the old note is secured by mortgage the presumption of payment does not arise as in other cases. So, if there be security for the old debt, and if it be retained."

ment to that effect before the acceptance of the security can operate as payment. The creditor may return the note when it is dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied by the condition of its payment.⁹ "A bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so," was the law as laid down by Lord Holt.¹⁰ And such has been the rule in England ever since; and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest.¹¹ Whenever it is alleged that the bill or note was payment under an express agreement, the burden of proving the agreement is on the party alleging it.¹² It is the rule which generally prevails that "proof of the giving of a promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and a settlement of all demands between the parties, and that the maker at the date of the note was indebted to the payee upon such settlement to the amount of such note. But this is a mere presumption which may be repelled by proofs of the consideration of such note and of the occasion and circumstances attending the giving of the same."¹³ But this view has in some cases

⁹ Clark v. Mundal, 1 Salk. 124, 91 Eng. Reprint, 116; The Kimball, 3 Wall. (U. S.) 37, 18 L. Ed. 50; Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. Ed. 522; Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341, and note; Vail v. Foster, 4 N. Y. 312; Winsted Bank v. Webb, 39 N. Y. 325, 100 Am. Dec. 435; Ward v. Howe, 38 N. H. 35; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Berry v. Griffin, 10 Md. 27, 69 Am. Dec. 123, and note; National Lumber Co. v. Whalley, 162 Cal. 224,

121 Pac. 729, and note; Detroit Chamber of Commerce v. Goodman, 35 L. R. A., N. S., 98.

¹⁰ Clark v. Mundal, *supra*.

¹¹ The Kimball (Duncan v. Kimball), 3 Wall. (U. S.) 37, 18 L. Ed. 50.

¹² Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341; Nightengal v. Chaffee, 11 R. I. 609, 23 Am. Rep. 531.

¹³ Dan. Neg. Inst., 5th ed., § 71; Ankeny v. Pierce, Breese (Ill.), 289, 12 Am. Dec. 174.

been rejected.¹⁴ In the dissenting case last referred to, the premises stated by the court were such as to lead to the belief that the conclusion would have followed the usual rule. In a case where the only proof exists in the production of a note on the one side, and evidence of an account anterior to the date of the note on the other side, it is very difficult for the court to lay down with precision any general rule applicable to such cases. A knowledge of the manner in which men generally transact their business is necessary in arriving at a correct conclusion to the question presented in this case. Lockwood, J., then proceeded: "Experience informs us that notes are frequently given as the consideration of a particular trade, without any reference to the situation of accounts between the parties leaving them to be settled at some future time, or in some particular manner. And notes, also, are given on the settlement of accounts, and for the balance due on such settlement. Is there, then, in the dealings among mankind, sufficient uniformity in relation to the execution of notes, to authorize the court to decide that a legal presumption is thereby raised that all previous demands are released or settled?" And then answers his question by saying that injustice would too often be done if they should sanction such a general rule.¹⁵ Notwithstanding the strong dis-

¹⁴ Ankeny v. Pierce, Breese (Ill.), 289, 12 Am. Dec. 174; Crabtree v. Rowland, 33 Ill. 421.

¹⁵ The doctrine here established that a note is not evidence of settlement of prior accounts and dealings between the parties is not that which generally prevails. The general rule on this subject is stated in Daniel on Neg. Inst., § 71. Mr. Daniel cites several New York cases in support of this principle: Lake v. Tyseu, 6 N. Y. 461; De Freest v. Bloomingdale, 5 Denio (N. Y.), 304; Dutcher v. Porter, 63 Barb. (N. Y.) 20; Sherman v. McIntire, 14 N. Y. Sup. Ct. (7 Hun) 592. There are decisions to the same effect in Indiana: Boffandick v. Raleigh, 11 Ind. 136;

Gaskin v. Wells, 15 Ind. 253; Kirchner v. Lewis, 27 Ind. 22; in Iowa; Smith v. Bissell, 2 G. Greene (Iowa), 379; and in Missouri: Kinman v. Cannefax, 34 Mo. 147. The rule laid down in Ankeny v. Pierce, *supra*, seems to be firmly established in Illinois. It was fully affirmed in Crabtree v. Rowland, 33 Ill. 421. In that case the court below instructed the jury that the giving of a note, if unexplained, was *prima facie* evidence of a settlement of all prior accounts and demands between the parties, but that it might be rebutted by proof to the contrary. In reviewing these instructions in the appellate court, Walker, C. J., delivering the opinion, said: "If the general course of the business of the

sent which the Illinois cases disclose, the weight of authority supports the rule, which is succinctly put in another opinion,¹⁶ that where there are cross-demands or mutual accounts between parties, and one gives the other a note or security for the payment of a definite sum growing out of said accounts or transactions, or some of them, the presumption arises that the amount for which such note or security is given is the balance due the party to whom it is given upon a statement or settlement of the mutual ac-

country was such that a note was never given, or was not usually given except on a full settlement of all existing accounts between the parties, then the instruction would have been correct. But we know that such is not the business usage of the country. This rule was announced in the case of *Ankeny v. Pierce*, Breese, 226. The court in that case say it is safer to require a party who resists a demand upon the ground that it has been paid, to prove in what manner it has been paid. And that slight evidence would doubtless be sufficient in such a case to warrant a jury in presuming that the account was settled when the note was executed, but without any proof of a settlement of accounts it is presuming too much to justify the court in deciding that the execution of a note is evidence of a settlement of all accounts between the parties. This decision has not been disturbed, and has been acted upon since it was announced as the correct rule. Nor is any reason perceived why we should change a rule so long acquiesced in, simply to make it conform to more recent decisions of courts of other states. It seems to us to be based upon reason, well calculated to promote justice, and no necessity exists for a change of the rule. The opposite rule would work hardship, if not manifest injustice in many cases."

¹⁶ *Marmion v. McClellan*, 11 App.

D. C. 467, citing *Chappedelaine v. Dechenaue*, 4 Cranch (U. S.), 306, 2 L. Ed. 629; *Lake v. Tysen*, 6 N. Y. 461; *DeFreest v. Bloomingdale*, 5 Denio (N. Y.), 304; *Maybury v. Berkery*, 102 Mich. 126, 60 N. W. 699; *Rice's Ev.*, p. 103; 1 *Taylor, Ev.*, § 124; *Gaskin v. Wells*, 15 Ind. 253. In *DeFreest v. Bloomingdale*, *supra*, *Beardsley, C. J.*, said: "It does not appear what this note was given for, and, unexplained, the giving of the note was *prima facie* evidence that nothing remained due to the maker of the note from the person to whom it was delivered. This is a reasonable inference from the fact of giving a note, and the principle applies with full force to this case, for there was nothing to show on what consideration the note was given, or to rebut the ordinary presumption, that the demands between the parties were then liquidated and the note made for the balance found to be due from the maker. It is highly improbable that the plaintiff would have given his note to a person who was then indebted to him in a sum, according to this report, much beyond the amount of the note, and until some explanation shall be given the note is decisive evidence against any such claim. If an explanation can be given it must come from the plaintiff, for the presumption is that the note was given for a balance admitted to be due."

counts existing between them at the time, including all the items or demands which each then had against the other; and the burden is upon the party controverting such presumption to prove by clear and satisfactory evidence, not only that some items were omitted from said accounting, but also that they were omitted by the mutual mistake of both parties or the fraud of the party to whom the note or security is given.

§ 73a. Same—Of third party.—The receipt by the creditor of the note of a third party and his subsequent dealing with it must always be considered from different points of view. Firstly, was it for a past or a present debt, and secondly, was it intended as payment? Fortunately, the law may be said to be settled on each and all of these points. The acceptance of the note of a third person by the creditor from his debtor does not operate as a satisfaction of the precedent debt, unless it be shown that such at the time was the agreement of the parties. The *onus* of showing that the note or bill was taken by the creditor in payment or satisfaction of the precedent debt is upon the debtor.¹⁷ Independent of an actual agreement, the conduct of the parties may determine that a note of a third party has been taken as payment by the creditor. The note or bill of a third party taken by a creditor may, under circumstances, be satisfaction absolutely; that is, when so intended. But at the same time the current of authorities in case of a pre-existing debt is the other way, establishing that the discharge of such debt is not presumed from the creditor accepting a note or bill of another merely, but there must be an agreement to that effect,

¹⁷ Noel v. Murray, 13 N. Y. 167. The difficulties in the application of this rule have generally been found to be in determining what evidence was sufficient to establish the fact of the agreement, or to justify submitting the evidence to the jury as raising a question of fact for their determination: See Waydell v. Luer, 3 Denio (N. Y.), 410, and cases cited

by Lott, Senator; Breed v. Cook, 15 Johns. (N. Y.) 241; Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Arnold v. Camp, 12 Johns. (N. Y.) 409, 7 Am. Dec. 328, Noel v. Murray, *supra*, is cited with approval in Delafield v. Lewis Mercer Const. Co., 118 N. C. 105, 25 S. E. 10.

either express or to be inferred plainly from the circumstances and conduct of the parties.¹⁸ It is to be noted that in Maine and Massachusetts there are decisions that where the third party's note is taken for an antecedent debt, the presumption that it was taken in payment arises.¹⁹

§ 73b (70). Same—Indorsement of credits—New note for old.—It will be noted that we have dealt only with the acceptance of an original note or bill for a past indebtedness; but there frequently also arises the consideration of the effect of giving a new note for one past due, or of the indorsement of part payment on an original note. Where a party takes up a note on which credits are indorsed and gives a new note for the balance, a settlement of the amounts of the credits is presumed.²⁰ When payments are shown by the maker to the payee of an outstanding note, and the proof shows that there have been no other dealings, proof of the payment of money by the maker to the payee raises the presumption that such payments were

¹⁸ *Gordon v. Price*, 32 N. C. 385. The authorities are collected in *Bankers' Trust Co. v. T. A. Gillespie Co.*, 181 Fed. 448, which also cites 3 *Randolph on Commercial Paper*, section 1534, that: "If the debtor gives the note of another person in settlement, it will still be no payment unless it is so agreed." "And by the general commercial law, as well of England as the United States, a bill of exchange drawn, or a promissory note made by the debtor does not discharge the preceding debt for which it is given, unless such be the agreement of the parties": 2 *Daniel on Negotiable Instruments*, p. 288. And the same author goes on to say that it was said in the time of Lord Holt: "A bill shall never go in discharge of a preceding debt, except it be a part of the contract that it shall be so." This doctrine is sustained in *Peter, Exr., v. Beverly et al.*, 35 U. S. 532, 9 L. Ed. 522, and in *Lyman et al. v.*

Bank of United States, 53 U. S. 225, 13 L. Ed. 965.

¹⁹ *Parkhurst v. Jackson*, 36 Me. 404; *Ely v. James*, 123 Mass. 36. The Massachusetts rule was applied to the note of a third person given for a pre-existing debt in *Wiseman v. Lyman*, 7 Mass. 286, and was recognized as so applicable in *French v. Price*, 24 Pick. (Mass.) 13, 21, and in *Butts v. Dean*, 2 Met. (Mass.) 76, 35 Am. Dec. 389. It is too late for this court to change the rule. In Wisconsin there appears to have been at one time a leaning to the Massachusetts rule, but *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. 694, appears to have dispelled any doubt which existed. That case wisely refers to *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397, in which the authorities freely contributed by counsel are discussed.

²⁰ *Greenwade v. Greenwade*, 3 Dana (Ky.), 495.

made to apply on the note;²¹ and where a new note is given for a less amount than an old one, in renewal thereof, the presumption is that all the differences between the parties were adjusted and settled by the acceptance of a new note. But this presumption is of course *subject to rebuttal*.²² And such rebuttal must be upon satisfactory evidence pointing to an absolute agreement between the parties that the new note was given without prejudice to the rights of the payee under the old one, and of its maker, to such defenses as would have been available if the new note had not been given. Needless to say, such rebutting circumstances are exceedingly rare, but if the old note is left in the possession of the payee, his denial of the settlement would be proportionately as strong as would the affirmance of it if the old note had been given up to the maker.²³

§ 73c (70). Same—Effect of negotiating the note.—As we have shown, the taking a negotiable promissory note or draft of the debtor, on account of a pre-existing debt, is not payment or discharge of such indebtedness. If the instrument taken be payable on demand, it does not affect the original debt, the party being at liberty to sue at any

²¹ *Somervail v. Gillies*, 31 Wis. 152. In this case the presumption of payment arising from the maker's having paid or delivered money to the payee of the note was encountered by the opposite presumption, arising from the note remaining in the hands of the payee, uncanceled and with no receipts of the alleged payments indorsed. The mere fact of the payment by one person to another is presumptive evidence of the payment of an antecedent debt, and not of a loan. Had it been shown that there were no other dealings between the parties, and that no other indebtedness existed than upon the note in suit, the proof of payment of money by the maker to the payee of the note would have created a very strong and almost conclusive presumption of payment upon the note. But no such

facts were shown. "Under such circumstances, to give the maker of the note the benefit of the presumption claimed for him, required at the same time the aid of another presumption, which cannot be indulged, namely, that there were no other dealings to which the payments could have been applied. The presumption of payment of the note, therefore, arising from the mere facts of payments of money being shown to have been made by the maker to the payee, is not only met, but in fact overcome, by the presumption arising from the possession of the note by the payee still uncanceled and unextinguished by indorsements of payments upon it."

²² *Piper v. Wade*, 57 Ga. 223.

²³ See *Piper v. Wade*, *supra*.

time therefor, and is only required to deliver up the note before judgment. If payable at a future day, the right to sue for the original debt is suspended until the maturity of the note. It operates as an agreement not to sue until default be made in the payment of the note. The taking of the instrument on account of the debt operates as a conditional payment, and the understanding of the parties is deemed to be that, if paid, it shall discharge the original debt and not otherwise. "The actual negotiation of the instrument produces no other effect than to suspend still further the right of the creditor to sue, until the instrument be returned to him unpaid. This is the result in the absence of any agreement of the parties otherwise. If so agreed by them, it may and will operate as absolute payment, and the original debt will thereby be absolutely discharged."²⁴ In some states it has been held that the taking of a negotiable instrument does raise the presumption of payment, in that it is *prima facie* evidence of such intent on the part of the creditor. If the negotiation of the debtor's own note raises the presumption, it is reasonable to assume that the negotiation of a third party's note would raise the same, if not a stronger, presumption of its acceptance as payment.²⁵

§ 74 (71). Presumption of ownership from possession. The fact of possession, in the eye of the law, suggests always ownership, and whether it is put in Latin as *potior est conditio possidentis*,²⁶ or in colloquial Anglo-Saxon that "possession is nine points of the law," it goes without saying that proof of the possession of property is *prima facie* evidence of title to it, both with regard to real and personal property. Indeed, it may be said that the presumption has attained its full growth. Pollock says: "It has been said that there is no doctrine of possession in our law. The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all

²⁴ Sweet & Carpenter v. James, 2 R. I. 270. ²⁶ 2 Inst. 391; Broom Leg. Max, p. 719.

²⁵ Sweet & Carpenter v. James, *supra*.

but swallowed up ownership; and the rights of a possessor, or one entitled to possess, have all but monopolized the very name of property.”²⁷ The same learned judge, in comparing the status of owners in olden time and now, says that the “owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes, the true owner of goods is the person, and only the person, entitled to immediate possession.”²⁸ This presumption of ownership from possession is founded on the theory that such possession is rightful. Among other grounds which have been assigned for this presumption are these: that it is in accord with the general principles of law to suppose, until the contrary is shown, that possession is lawful rather than unlawful; that since the rightful owners of property are not likely to consent that their property remain in the continued possession of others who assert title thereto, it is a natural conclusion that possession of this character is authorized by some grant or license; and finally, as stated by Judge Story, “presumptions of this character are adopted from the general infirmity of human nature, the difficulty of preserving the muniments of title and the public policy of supporting long and uninterrupted possession.”²⁹ The presumption is dealt with in regard to personal property—the rights of possession and the remedies for deprivation or interference with those rights—just as frequently. A familiar English case illustrates the rule that one having bare possession may raise a presumption of ownership and sustain an action against a wrongdoer: A chimney-sweeper’s boy, having found a jewel, carried it to a goldsmith to ascertain its value, but the goldsmith, by his ap-

²⁷ Webb’s *Pollock on Torts*, 417.

²⁸ *Id.* 416.

²⁹ *Ricard v. Williams*, 7 Wheat. (U. S.) 109, 5 L. Ed. 398; *University of Vermont v. Reynolds*, 3 Vt. 542, 23 Am. Dec. 234; *Bradshaw v. Ashley*, 180 U. S. 59, 45 L. Ed. 432, 21 Sup. Ct. Rep. 297; *Jackson v.*

McCall, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; *Harland v. Eastman*, 119 Ill. 28, 8 N. E. 810; *Doe v. Reed*, 5 Barn. & Ald. 232, 106 Eng. Reprint, 1177. See note on “Possession as Evidence of Title,” *State v. Hazard*, 60 Am. Dec. 101.

prentice, detained it and refused to restore it. The boy having brought trover, it was held that his possession was some evidence of property, good against anyone except the true owner; that he could maintain trover for it on such *prima facie* proof of title, and that refusal to restore it on demand was evidence of conversion. In actions of trespass, replevin and trover the principles which guide the courts with regard to the possession necessary to maintain the suit have been clearly defined. To maintain the action of trespass it is essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself, or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure.³⁰ Possession acquired tortiously is sufficient against a stranger who can show no

³⁰ *Wilson v. Martin*, 40 N. H. 88. But where the general owner has parted with the actual possession in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property: 1 Chit. Pl., 7th ed., 188, 195; 2 Greenl. Ev., §§ 613, 614, 616, and authorities cited; *Clark v. Carlton*, 1 N. H. 110; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71; *Heath v. West*, 28 N. H. 101; *Moulton v. Robinson*, 27 N. H. 550; *Marshall v. Davis*, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; *Nash v. Mosher*, 19 Wend.

431; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Gay v. Smith*, 38 N. H. 171. Since actual or constructive possession is necessary to support the action, it follows that trespass will not lie where there is a mere right to obtain possession by action or other legal proceeding. Thus a widow cannot maintain trespass against the administrator of her deceased husband for refusing to set apart to her certain goods of the estate, as required by statute, and for disposing of them in course of administration: *Neely v. McCormick*, 25 Pa. 255. Nor can the action be founded upon a demand and refusal after the taking of the goods: *Imlay v. Sage*, 5 Conn. 489.

better right.³¹ Thus, where the defendant, an officer who had seized the property on execution, attempted to show, under the general issue, that the plaintiff's possession was acquired by a fraudulent sale from the execution debtor, the execution having been excluded on account of a variance between it and the plea of justification, the court would not permit him to do so.³² If the plaintiff in an action of trespass for the taking or injury of chattels had not actual possession when the wrong was committed, he must have had constructive possession or the action will not lie; that is to say, he must have had a property in the thing and the right to immediate possession.³³ It is well settled that, as against a mere stranger or wrongdoer, who can show no better right, bare possession is sufficient to maintain trespass for an injury to, or the taking of, a chattel.³⁴

³¹ 2 Greenl. Ev., § 617, and cases there cited; *Criner v. Pike*, 2 Head (Tenn.), 398.

³² *Harrison v. Davis*, 2 Stew. (Ala.) 350. To the same effect is *Demick v. Chapman*, 11 Johns. (N. Y.) 132. So in *Wustland v. Potterfield*, 9 W. Va. 438, possession was held sufficient evidence of title to maintain trespass against mere strangers, where the defendants offered certain admissions of the plaintiff's grantor to prove that the transfer was fraudulent. So in *Fletcher v. Cole*, 26 Vt. 170, it was held that one tort-feasor may always recover in trespass against a subsequent tort-feasor who shows no right whatever. But possession acquired by an unlawful sale can never enable one to maintain trespass against the true owner: *Reed v. Lucas*, 42 Tex. 529. Possession under a void assignment, with the consent of the true owner, is sufficient title against a mere stranger: *Barker v. Chase*, 24 Me. 230.

³³ 1 Waterman on Trespass, §§ 520, 521, 522; *Smith v. Milles*, 1 Term. Rep. 475, 99 Eng. Reprint, 1205; *Woodruff v. Halsey*, 8 Pick.

(Mass.) 333, 19 Am. Dec. 329; *Brown v. Thomas*, 26 Miss. 335; *Howe v. Farrar*, 44 Me. 233, and cases cited. Constructive possession is thus defined by Parker, C. J., in *Woodruff v. Halsey*, 8 Pick. (Mass.) 333, 19 Am. Dec. 329: "Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately, the person in possession not being entitled to retain it against his will."

³⁴ 1 Hilliard on Torts, 518; 2 Greenl. Ev., § 614; 1 Waterman on Trespass, § 515; *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Gelston v. Hoyt*, 13 Johns. (N. Y.) 561; *Graham v. Peat*, 1 East, 244, 102 Eng. Reprint, 95; *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543, and note; *Hendricks v. Decker*, 35 Barb. (N. Y.) 298; *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39; *Pickering v. Coleman*, 12 N. H. 148; *Boston v. Neat*, 12 Mo. 125; *Brown v. Ware*, 25 Me. 411; *Staples v. Smith*, 48 Me. 470. Thus, a naked bailee from whose actual and exclusive possession a chattel is wrong-

The same presumption arises in replevin³⁵ and in trover.³⁶ In criminal cases, it has been held sufficient evidence of ownership in prosecutions for robbery.³⁷ The presumption of title arising from possession, however, does not obtain

fully taken may maintain the action: *Carson v. Prater*, 6 Cold. (Tenn.) 565. So may a tenant of a farm upon which the property is when taken: *Gilson v. Wood*, 20 Ill. 37. And actual possession is sufficient against a wrongdoer, or one who can show no better title, though it be "without the consent, or even adverse to the real owner": *Miller v. Kirby*, 74 Ill. 242. It is no defense to show title in a third person, unless the defendant connects himself therewith: *Hammer v. Wilsey*, 17 Wend. (N. Y.) 91; *Sickles v. Gould*, 51 How. Pr. (N. Y.) 22; *Crawford v. Bynum*, 7 Yerg. (Tenn.) 381.

³⁵ *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551; *Rawley v. Brown*, 71 N. Y. 85 (Possession of property alone and without explanation is evidence of ownership; but is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having the possession, no presumption of ownership arises solely from such possession. The law raises no presumption as to the character of the occupation of one cultivating the farm of another with the instruments of husbandry, beasts of the plow, teams and domestic animals of the owner of the farm, or as to the right of either to the growing crops and products of the farm, but leaves it a question of fact, to be determined by a jury upon the evidence and all the circumstances of the case.

It does not assume to determine by any fixed and certain rule of presumption, without evidence, the relation existing between the owner of agricultural lands and a temporary occupant thereof, and to whom or in what proportion the products belong either when growing or on being harvested); *Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104 (the presumption is admitted and the burden assumed by the plaintiff when he brings suit).

³⁶ *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543, and note; *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49.

³⁷ *Howard v. People*, 193 Ill. 615, 61 N. E. 1016. "The averment in the indictment was that it was the property of Ritchie that was taken, and the possession by Ritchie of that property was evidence supporting that averment. In *Bow v. People*, 160 Ill. 438, 43 N. E. 593, we held that the fact of the robbery from the person of the prosecuting witness of money which he had in his pocket was sufficient evidence of ownership. To have found the verdict they did, the jury must have found that the plaintiff in error took the shoes in question from Ritchie; and, if they did so find, then such taking, together with the other evidence in the case, sufficiently established the ownership of the property"; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312. (In the absence of evidence to the contrary, in larceny or robbery, possession of the stolen property is sufficient evidence of ownership. "The criminal law of this state is not favorably disposed in allowing criminals to escape upon technicalities of this char-

in favor of one who *unlawfully* takes property from the possession of another, when an action is brought for its recovery or conversion.³⁸

§ 74a (71). Same—Possession of a subordinate.—One who is in possession of a chattel as a mere servant cannot maintain trespass, for his possession is that of his master or employer. Possession in that character cannot warrant a presumption of ownership. On this principle it was held³⁹ that the school committee of a town could not maintain trespass for the taking of the school registers by other persons claiming also to be the school committee, for the reason that they were merely the servants of the town. “A party cannot maintain an action of trespass for taking and carrying away chattels from him, unless he had actual or constructive possession thereof, at the time of the taking, and also a general or qualified property therein. As against a mere stranger and wrongdoer, possession is sufficient evidence of property. But the possession of a servant is the legal possession of the master only; and when chattels are taken from the servant, they are taken from the possession of the master, who alone can maintain trespass and recover damages against the taker.”⁴⁰ Where one occupies a farm and uses the farm implements and teams of another, no presumption arises from such possession as to the ownership of the growing crops.⁴¹ The possession of an officer of a corporation is the possession of

acter; and, as supporting the principle here declared, we cite *People v. Nelson*, 56 Cal. 77; *People v. Davis*, 97 Cal. 194, 31 Pac. 1109.”)

³⁸ *Cumberledge v. Cole*, 44 Iowa, 181; *Weston v. Higgins*, 40 Me. 102; *Price v. Powell*, 3 N. Y. 322.

³⁹ *Perkins v. Weston*, 3 Cush. (Mass.) 549.

⁴⁰ *Gouldsb. 72*, pl. 18; *Bloss v. Holman*, Owen, 52; 2 Bl. Com. 396; *Hammond*, N. P. 222; 3 Steph. N. P. 2636. See, also, *Addison v. Round*, 6 Nev. & M. 422. We give *Gouldsborough's* report in his own words:

“The servant hath neither general nor special property in the goods, and he shall have no action or trespass if they be taken away, and therefore if he take them, trespass lieth against him, and if he imbezell them, it is felony.” 75 Eng. Reprint, p. 1002; *Linseott v. Trask*, 35 Me. 150; *Succession of Boisblanc*, 32 La. Ann. 109.

⁴¹ *Rawley v. Brown*, 71 N. Y. 85; *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *Stacy v. Graham*, 3 Duer (N. Y.), 444; *Bailey v. Steamer*, 2 Cal. 370.

the corporation; and when chattels belonging to the corporation are taken from him, they are taken from the possession of the corporation, which alone is entitled to sue for and recover damages for the taking, unless the officer is authorized by statute to sue in his own name. So, in the case of the school registers above referred to, the school committee had no property, general or qualified, in the school registers, and no such possession thereof, distinct from the possession of the town, as was required by law in order to enable them to maintain an action and recover damages to their own use; they had only the custody or charge of the registers, as officers and servants of the town.⁴² From the nature of this presumption it may be easily rebutted, and it affords no protection to one who purchases property or otherwise obtains it from one who is not the real owner.⁴³ In the code states the presumption is embodied generally in two divisions—the first, that things which a person possesses are owned by him, and, second, that a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.⁴⁴

§ 74b (71). Same—Possession of bailees and others.—A bailee of chattels may maintain trespass for the taking of them against anyone but the owner; and if he have an interest and the taking is tortious, he may maintain the action even against the owner.⁴⁵ Thus, where certain skins were delivered by the owner to the plaintiffs to be manufactured into morocco, and turned over to the owner at the plaintiffs' shop at so much apiece, and the owner after-

⁴² Perkins v. Weston, *supra*. But in Moore v. Robinson, 2 Barn. & Adol. 817, 109 Eng. Reprint, 1346, it was held that the master of a fly-boat, employed to navigate her for weekly wages, and having other persons under him to work the vessel, had such an interest in her that he could maintain trespass against one who cut the rope by which she was towed.

⁴³ Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631, and elaborate note.

⁴⁴ Cal. Code Civ. Proc., § 1963 (12).

⁴⁵ Jones v. McNeil, 2 Bail. (S. C.) 466; Cowing v. Snow, 11 Mass. 415; Neff v. Thompson, 8 Barb. (N. Y.) 213; Sutton v. Buck, 2 Taunt. 302; Faulkner v. Brown, 13 Wend. (N. Y.) 63, and cases there cited.

ward turned them out to a creditor, who caused them to be attached, it was held that the plaintiffs could maintain trespass for such taking.⁴⁶ An officer in possession of goods by virtue of a levy of an execution or attachment has such a special property therein that he can maintain trespass for the taking or other injury of such goods.⁴⁷ A mortgagor of a chattel may maintain trespass against a stranger who wrongfully takes it from his possession, and the fact of the mortgage is no defense to the action;⁴⁸ and creditors in possession of property of their debtor, under a contract allowing them to manage and control it until their claim is paid, may have trespass against an officer attaching it as the debtor's property.⁴⁹

§ 74c (71). Same—Negotiable paper.—Possession and the production of a note unanceled and unextinguished by indorsement of payments, or otherwise, is *prima facie* evidence that the holder is the owner, and that the note is unpaid.⁵⁰ But the mere possession by a third party of unindorsed negotiable paper, payable to the order of the payee therein named, is not even *prima facie* evidence of title in the holder as against such payee. While the possession of unindorsed negotiable paper may well be received as *prima facie* evidence as against a stranger to the title, the naked and unexplained possession of such paper can by no means be presumptive evidence against the

⁴⁶ *Burdiet v. Murray*, 3 Vt. 302, 21 Am. Dec. 588. For other cases see note to *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

⁴⁷ *Whitney v. Ladd*, 10 Vt. 165; *Sewell v. Harrington*, 11 Vt. 141, 34 Am. Dec. 675; *Gibbs v. Chase*, 10 Mass. 125.

⁴⁸ *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91.

⁴⁹ *Howe v. Keeler*, 27 Conn. 538.

⁵⁰ *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Somervail v. Gillies*, 31 Wis. 152; *Commercial Bank v. Burgwyn*, 108 N. C. 62, 23 Am. St. Rep. 49, and note,

17 L. R. A. 326, 12 Pac. 952; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454, 3 Am. St. Rep. 241, and note, 3 S. W. 805; see, also, *Vosburgh v. Dieffendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, and note, 23 N. E. 801; *Rubey v. Culbertson*, 35 Iowa, 264; *Bachelor v. Priest*, 12 Pick. (Mass.) 399; *Cone v. Brown*, 15 Rich. (S. C.) 262; *Mars v. Mars*, 27 S. C. 132, 3 S. E. 60; *James v. Chalmers*, 6 N. Y. 209; *Jackson v. Love*, 82 N. C. 405, 33 Am. Rep. 685; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, and note, 28 Pac. 391.

payee.⁵¹ A bill of lading raises the presumption of property in the goods in the consignee.⁵²

§ 74d (71). **Same—Animals *ferae naturae*.**—To constitute such possession of animals *ferae naturae* as to enable the possessor to maintain trespass for them, they must be brought into his actual power. Where one was pursuing a fox and another person in his sight killed and carried away the animal, it was held that the former had not such possession as to be able to maintain trespass.⁵³

⁵¹ *Vastine v. Wilding*, 45 Mo. 89, 100 Am. Dec. 347, and note. Upon this subject the decisions are to some extent conflicting, and those in support of *Vastine v. Wilding*, *supra*, are fully set out in the note referred to, but a different view is taken in *North Carolina*, and the supreme court of that state has decided that the possession of an unindorsed negotiable note or bond, not payable to bearer, raises a presumption that the person producing it is the real and rightful owner, and entitled to the money due from the promisor: *Jackson v. Love*, 82 N. C. 405, 33 Am. Rep. 685. Such a presumption, it is said, seems necessary and expedient under the method of civil procedure in that state, which requires civil actions generally to be prosecuted in the name of the real party in interest, and that the legal and equitable rights of litigants shall be administered in the same action, when need be: *Merrimon, J.*, in *Holly v. Holly*, 94 N. C. 670, 673. Nevertheless, it is a presumption which is only evidence against the defendant in an action upon the note, and, as a mere presumption, cannot avail the holder in an action brought against him by the legal owner: *Robertson v. Dunn*, 87 N. C. 191. The presumption does not arise as between the holder and the payee, who has the legal title, but only as between the holder and

payor: *Holly v. Holly*, 94 N. C. 670; and see *Pugh v. Grant*, 86 N. C. 39. See, also, note to *Commercial Bank v. Burgwyn*, *supra*, 17 L. R. A. 326, in which the subject is well treated and the cases carefully collected.

⁵² *Lawrence v. Minturn*, 17 How. (U. S.) 107, 15 L. Ed. 58.

⁵³ 2 Greenl. Ev., § 620; *Pierson v. Post*, 3 Caines (N. Y.), 175, 2 Am. Dec. 264. Citing this case, 2 Kent, Com. 349, says: "It was held by the supreme court of New York, in *Pierson v. Post*, the pursuit alone gave no property in animals *ferae naturae*. Almost all the jurists on general jurisprudence agree that the animal must have been brought within the power of the pursuer before the property in the animal vests. Actual taking may not in all cases be requisite, but all agree that mere pursuit without bringing the animal within the power of the party is not sufficient. The possession must be so far established by the aid of nets, snares or other means, that the animal cannot escape. It was accordingly held in the case just mentioned, that an action would not lie against a person for killing and taking a fox which had been pursued by another and was then actually in view of the person who had originally found, started and chased it. The mere pursuit and being in view of the animal did not create a property,

§ 75 (72). **The presumption of title from the possession of lands.**—The difference between the circumstances of possession of real and of personal property renders the application of the presumption of ownership to real property both more difficult and more important than that to personalty. From an early period of the common law the courts seem to have delighted in some relaxation of the strict rules of evidence in favor of those who had long been in the enjoyment of those easements and franchises which could be created by grant without record. In later times the courts of this country have indulged in similar favors to those in the possession of corporeal hereditaments. One of the most common muniments of title to real estate is the presumption, from long possession, that such possession is lawful rather than unlawful,—in other words, that it is supported by a grant. It has become a well-established rule that the peaceable possession of real estate is presumptive evidence of title until the contrary is shown.⁵⁴ The title which adverse pos-

because no possession had been acquired; and the same doctrine was afterward declared in the case of *Buster v. Newkirk*, 20 Johns. (N. Y.) 75." This case is also cited in 1 Schouler on Pers. Prop. 80. The Civil Code of California, section 656, provides: "Animals wild by nature are the subjects of ownership while living only when on the land of the person claiming them, or when tamed, or taken or held in possession, or disabled and immediately pursued."

⁵⁴ *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; *Smith v. Lorillard*, 10 Johns. (N. Y.) 339; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Wausau Boom Co. v. Plumer*, 35 Wis. 274; *Bagley v. Kennedy*, 85 Ga. 703, 11 S. E. 1091; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; *Eakin v. Brewer*, 60 Ala. 579; *Hicks v. Davis*, 4 Cal. 67; *Jones v. Nunn*, 12 Ga. 472; *Day v. Alverson*, 9 Wend. (N. Y.) 223; *De Noon v. Morrison*, 83 Cal.

163, 23 Pac. 374, 16 Morr. Min. Rep. 33 (as to mining claims); *Carino v. Insular Government*, 212 U. S. 449, 53 L. Ed. 594, 29 Sup. Ct. Rep. 334; *Dodge v. Irvington Land Co.*, 158 Ala. 91, 48 South. 383, 594, 22 L. R. A., N. S., 1100; *Bates v. Hall*, 44 Colo. 360, 98 Pac. 3 (water rights); *Downey v. Moriarity*, 81 Conn. 442, 71 Atl. 581 (administrator's possession); *Rexford v. Bleckley*, 131 Ga. 678, 63 S. E. 337 (where an administrator undertook to sell at public outcry lands of the decedent, and a claim thereto was interposed by a third person, upon the trial of the issue thus raised, it was not erroneous for the judge to charge in effect that, if the decedent died in possession of the land, such possession would be sufficient to raise a presumption of title); *Stevens v. Town of Sandnes*, 108 Minn. 271, 121 N. W. 902; *Sewell v. Home Ins. Co.*, 131 App. Div. 131, 115 N. Y. Supp. 345 (where tenant became purchaser); *Gabriel v. Bartolome*, 7 Phil. Isl. 699;

session gives is one in fee simple, and consequently its acquisition must be safeguarded and all the avenues of approach to it watched with the argus-eye of the law that no one is wronged.⁵⁵ Theoretically, at least, possession is the primitive mode of acquisition of all property, and constitutes the ultimate foundation upon which every title rests. It constitutes, also, the only means of enjoyment of property. Hence it is necessarily the conspicuous badge or sign of ownership.⁵⁶ This is a principle firmly imbedded in all common-law jurisprudence.⁵⁷ It follows from what has already been stated that in an action of ejectment,

Soler v. Parkhurst, 4 Porto Rico Fed. 335; *Thacker v. Wilson* (Tex. Civ. App.), 122 S. W. 938 (actual or pedal possession of part applying to whole).

⁵⁵ *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983. Adverse possession, as defined in the Code of Civil Procedure, if continued for a period exceeding five years, is not only sufficient to bar a claimant under a legal title, but it is also sufficient to create a title. Such possession so continued vests in the possessor a title in fee simple against all other claimants.

⁵⁶ 3 Washb. Real Property, 114.

⁵⁷ *Hicks v. Davis*, 4 Cal. 67. The doctrine is sometimes stated to be, that to establish a presumption of title from mere possession, it must be shown that the possession is under a claim of right; but this seems to be unnecessary, for unless the contrary appears, the presumption will be that the possession is in the possessor's own rights, since the law never presumes a wrong: *Jackson v. Commissioners*, 1 Dev. & B. L. (18 N. C.) 177. It is held that the presumption arising from possession is a presumption of seisin in fee: *Bull. N. P.* 103, 109; *Asher v. Whitlock*, L. R. 1 Q. B. 1; S. C., 11 Jur., N. S., 925, 35 L. J. Q. B. 17; 14 Week. Rep. 26; *Day v. Alverson*, 9 Wend. (N. Y.) 223. "But this doctrine," says Mr. Tyler, "needs to be qualified

a little. Undoubtedly if a person be found in possession of land, claiming it as his own in fee, it is *prima facie* evidence of his ownership and seisin of the inheritance. It is not, however, the possession, but the possession accompanied with the claim of the fee, that gives this effect, by construction of law, to the acts of the party. Possession *per se* evidences no more than the mere fact of present occupation by right, for the law will not presume a wrong; and that possession is just as consistent with a present interest under a lease for years or for life as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances what is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favor: *La Frombois v. Jackson*, 8 Cow. (N. Y.) 603, 18 Am. Dec. 463; *Adams v. Guice*, 30 Miss. 397; *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 5 L. Ed. 398; *Jackson v. Porter*, 1 Paine, 457, Fed. Cas. No. 7143; *Tyler on Eject.* 71. See, also, *Ward v. McIntosh*, 12 Ohio St. 231. In some of the cases, possession is said to be something more than mere evidence of title, and to constitute of itself a grade of title, though it is the lowest grade: *Jones' Admr. v. Nunn*, 12 Ga. 472. In some states it is held that mere naked possession,

proof of prior possession alone, under a claim of title, on the part of the plaintiff or those under whom he claims, will be sufficient, *prima facie*, to maintain the action as against a subsequent possessor who is a mere intruder, or a tenant of the plaintiff, or one who is in by entry only, and shows no better title, by adverse possession or otherwise.⁵⁸ That the first possession, says Kent, C. J., should, in such cases, be the better evidence of right, seems to be the just and necessary inference of law. 'The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has, in the first instance; and after a continued possession for twenty years, under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry. But until the possession of the tenant has become so matured, it

unless continued for such time as gives title under the statute of limitations, will not sustain ejectment: Doe v. Howell, 1 Houst. (Del.) 178; Breeding v. Taylor, 13 B. Mon. (Ky.) 477; Alexander v. Campbell, 74 Mo. 142.

⁵⁸ Smoot v. Lecatt, 1 Stew. (Ala.) 590; McCall v. Doe, 17 Ala. 533; Clarke v. Clarke's Admr., 51 Ala. 498; Anderson v. Melear, 56 Ala. 621; Eakin v. Brewer, 60 Ala. 579; Eagle etc. Mfg. Co. v. Gibson, 62 Ala. 369; Wilson v. Glenn, 68 Ala. 383; Jacks v. Dyer, 31 Ark. 334; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599, and note; Nagle v. Macy, 9 Cal. 426; Potter v. Knowles, 5 Cal. 88; Ayres v. Bensley, 32 Cal. 620; Seymour v. Creswell, 18 Fla. 29; Johnson v. Lancaster, 5 Ga. 39; Jones' Admr. v. Nunn, 12 Ga. 469, 471; Buckner v. Chambliss, 30 Ga. 652; Jones v. Easley, 53 Ga. 454; Pitts v. Bullard, 3 Ga. 5, 46 Am. Dec. 405; McLawrin v. Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563; Mettler v. Miller, 129 Ill. 630, 22 N.

E. 529; Hicks v. Steigleman, 49 Miss. 377; Kerr v. Farish, 52 Miss. 101; Lum v. Reed, 53 Miss. 73; Crockett v. Morrison, 11 Mo. 1; Smith v. Lorrillard, 10 Johns. (N. Y.) 356; Day v. Alverson, 9 Wend. (N. Y.) 223; Murphy v. Loomis, 26 Hun (N. Y.), 659; Jackson v. Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; Tuttle v. Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Newman's Lessee v. Cincinnati, 18 Ohio, 323; Reed v. Shepley, 6 Vt. 602; Doe v. Dyeball, Moo. & M. 346, S. C., 3 Car. & P. 610; Davison v. Gent, 1 H. & N. 744, S. C., 3 Jur., N. S., 342, 26 L. J. Ex. 122; Asher v. Whitlock, L. R. 1 Q. B. 1; S. C., 11 Jur., N. S., 925; 35 L. J. Q. B. 17; 14 Week. Rep. 25; Moore v. Railway Co., 78 Wis. 120, 47 N. W. 273; Cain v. McCan, 2 Pen. (N. J.) 438, 4 Am. Dec. 384; Warner v. Page, 4 Vt. 291, 24 Am. Dec. 607; Wilson v. Palmer, 18 Tex. 592; Bradshaw v. Ashley, 180 U. S. 59, 45 L. Ed. 423, 21 Sup. Ct. Rep. 297; Sabariego v. Maverick, 124 U. S. 261, 31 L. Ed. 430, 8 Sup. Ct. Rep. 461, and cases cited.

would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned as derelict, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession, and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession, by showing a regular legal title or a right of possession. So though the plaintiff sets up a title which he fails to prove, he may recover on the strength of his prior possession against a bare subsequent possession.⁵⁹ When possession of real estate has existed uninterruptedly for a long period of years, the courts have uniformly regarded the presumption of ownership as greatly strengthened. So strongly have the courts favored titles fortified by long possession that it has been said: "An act of parliament, a grant from the crown, a deed, in fact anything which will quiet a possession may be presumed from length of time where such act, grant or deed would have been lawfully passed, made or given."⁶⁰

⁵⁹ Kent, C. J., in *Smith v. Lorillard*, *supra*; *Davison v. Gent*, 1 Hurl. & N. 744; S. C., 3 Jur., N. S., 342, 26 L. J. Ex. 122. The plaintiff may, to define the extent of his possession, introduce a deed from one having no title, with proof of entry and occupation thereunder: *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738. If, however, the plaintiff entered under a claim notorious and sufficient to account for his possession, such possession is not evidence of any other claim: *Lincoln v. Thompson*, 75 Mo. 613. Of course, also, possession alone is of no avail, unless continued for a period sufficient to give title under the statute of limitations, against a good title in fact: *Perkins v. Morse*, 30 Minn. 11, 13 N. W. 911,

14 N. W. 879; *Dunn v. Miller*, 75 Mo. 260. It has been suggested in some cases that a title founded on prior possession alone may be defeated by a subsequent possessor showing a good outstanding title in a stranger, with which such subsequent possessor does not connect himself: *Potter v. Knowles*, 5 Cal. 88; *Anderson v. Melear*, 56 Ala. 621; *Eakin v. Brewer*, 60 Ala. 579. But the contrary and better opinion is expressly laid down in *Hubbard v. Barry*, 21 Cal. 321; *Bates v. Campbell*, 25 Wis. 613; *Wilson v. Glenn*, 68 Ala. 383.

⁶⁰ *University of Vermont v. Reynolds*, 3 Vt. 542, 23 Am. Dec. 234, 242; *Nixon v. Carco*, 28 Miss. 414; *Wails v. Farrington*, 27 Okl. 754, 35 L. R. A., N. S., 1174, 116 Pac. 428.

§ 76 (73, 74). **Presumptions as to grants and other sources of title.**—Perhaps there is no presumption which goes the length of that which creates the beginning of a title claimed by long possession. The court of chancery in England, in 1707, first adopted the principle of presuming the former existence and loss of a deed, where a long and uninterrupted possession of an easement was shown. It was not until 1761 that this principle was adopted in the courts of common law in England. Some of the judges there were, at times, inclined to give this presumption the effect of a *presumptio juris et de jure*, a legal presumption binding on both courts and juries, as a rule from which neither had a right to depart, a presumption of a right constituting a perfect title or bar, as the case might be.⁶¹ The creation of the fiction was directly attributable to the law laying down the almost impossible condition of proving titles to easements, where their origin might be traced to some former grant back to the time beyond which the memory of man was supposed not to run; and the courts were driven to evade a rule absurd in itself and unjust in its consequences by refinements and fictions as a natural and necessary consequence. The current of English decisions went no further than to hold that long-continued and uninterrupted possession is evidence from which a jury may presume a deed.⁶² The English rule is now as expressed by Sir James Stephen in his work on Evidence, where he lays down the following rule as to the presumption of lost grants: “When it has been shown that any person, for a long period of time, exercised any proprietary right which

⁶¹ *Guernsey v. Rodbridge*, Gil. Eq. Cas. 4; S. C., 2 Vern. 390, 23 Eng. Reprint, 850, under the name of *Finch v. Resbridger*; *Wilmot, J.*, in *Lewis v. Price* and *Dougal v. Wilson*, Saund. 175a; *Eyre, C. J.*, in *Hed v. Holeroft*, 1 Bos. & P. 400; *Lord Ellenborough*, in *Balston v. Benstead*, 1 Camp. 163, and in *Bealey v. Shaw*, 6 East, 214, 102 Eng. Reprint, 1266; and *Lord Mansfield* in *Darwin v. Upton*, 2 Wms. Saund. 175a, 85 Eng.

Reprint, 924, and *Mayor v. Horner*, 1 Cowp. 102, 98 Eng. Reprint, 989.

⁶² *Wallace v. Fletcher*, 30 N. H. 434, citing *Keymer v. Summers*, Bull. N. P. 74; *Campbell v. Wilson*, 3 East, 294, 102 Eng. Reprint, 294; *Gray v. Bond*, 5 Moore, 327, 2 B. & B. 627; *Cross v. Lewis*, 2 B. & C. 686; *Darwin v. Upton*, 2 Wms. Saund. 175a, 85 Eng. Reprint, 924; *Livitt v. Wilson*, 3 Bing. 115.

might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost."⁶³ The necessity for the modification of the English rule when it came to this country was at once obvious. It was the wise course, prescribed by principle as well as by public convenience, to overrule the absurd decisions which sanctioned a fixed point in the early history of England, as the limit of legal memory, and at the same time to restore the principle upon which that decision appears to be made, that in case where the legislature has not fixed a precise rule of limitation, rights shall be acquired and barred by a prescription of such length of time as has been fixed by the legislature as the proper limitation in analogous cases. It was to adopt here as the law, that if a possession of twenty years is sufficient to give a man title to a house, there can be no reason why it should not be sufficient to give title to any easement belonging to the house.⁶⁴ Accordingly, when it is shown that there had

⁶³ Reynolds' *Stephen on Evidence*, art. 100. See, also, the interesting illustrations given by Stephen and the cases collected by Reynolds. See, also, *Goodtitle v. Baldwin*, 11 East, 488, 14 R. R. 674, 103 Eng. Reprint, 1092; *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 873, 7 Week. Rep. 685, 11 Eng. Reprint, 140.

⁶⁴ *Wallace v. Fletcher*, *supra*; *Hunt v. Hunt*, 3 Met. (Mass.) 185, 37 Am. Dec. 130; *Ricard v. Williams*, 7 Wheat. (U. S.) 110, 5 L. Ed. 398, 410. "There is no difference in the doctrine (as to presumptions of grants)," says Mr. Justice Story in *Ricard v. Williams*, *supra*, "whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a

grant of a fishery, or of common, or of way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant."

been adverse possession for twenty years or for the period fixed by the statute of limitations, though it be less than twenty years, it will be presumed that the possessor or some grantor had a deed, and that all acts necessary to give it effect had been performed.⁶⁵ In such cases the grant is presumed on principles of public policy, and not from any belief that a deed has actually been made. Hence, where the evidence is sufficient to warrant the legal inference of a grant, the jury may presume such a grant, though they may not believe that it was in fact made.⁶⁶ It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish a probability of the fact, that, in reality, a grant ever issued. It will afford a sufficient ground for the presumption, to show that, by legal possibility, a grant might have issued. And, this appearing, it may be assumed that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.⁶⁷ So deeds of partition may be presumed to have been executed where the joint owners have for a long time held possession of

⁶⁵ Courcier v. Graham, 1 Ohio, 330; Wallace v. Fletcher, 30 N. H. 434; Downing v. Ford, 9 Dana (Ky.), 391; Brattle Square Church v. Bullard, 2 Met. (Mass.) 363; Rooker v. Perkins, 14 Wis. 79. The doctrine is illustrated by a great many cases where possession had been held for different periods; Emans v. Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427 (one hundred years); Strimpf v. Roberts, 18 Pa. 288, 57 Am. Dec. 606 (twenty-one years); Doe v. Maxwell, 10 Ired. (N. C.) 110, 51 Am. Dec. 380 (thirty years); Newman v. Studley, 5 Mo. 291 (twenty-six years); McNair v. Hunt, 5 Mo. 300 (thirty years). Greenleaf (2 Greenl. Ev., § 539) lays the rule down thus: "By the weight of authority as well as the preponderance of opinion, it may be stated as the general rule of American law that an adverse, exclusive and uninter-

rupted enjoyment for twenty years of an incorporeal hereditament affords a conclusive presumption of a grant, or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever by possibility a right can be acquired in any manner known to the law. In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is, under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement." See, also, cases cited to that section in his work.

⁶⁶ Casey v. Inloes, 1 Gill (Md.), 430, 39 Am. Dec. 658; Fletcher v. Fuller, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667, and cases cited.

⁶⁷ Williams v. Donell, 2 Head (Tenn.), 695.

several tracts.⁶⁸ Where a way has been used openly, uninterruptedly, continuously, and exclusively for more than a period of twenty years, the origin of the way not being shown, there is a presumption of a right or grant from the long acquiescence of the party upon whose land the way is. This presumption of a grant or adverse right is with us *prima facie* merely and may be rebutted.⁶⁹ In the absence of evidence tending to show that such long-continued use of the way may be referred to a license, or other special indulgence, which is either revocable or terminable, the conclusion is, that it has grown out of a grant by the owner of the land; and has been exercised under a title thus derived. The law favors this conclusion, because it will not presume any man's act to be illegal. It is also reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it that could and ought not to be defeated. And beside, seeing it can work no prejudice to anyone, excepting to him who has been guilty of great negligence, to say the least of it, public policy and convenience require that this presumption should be made, in order to promote the public peace, and quiet men in their possession.⁷⁰ Where con-

⁶⁸ *Hepburn v. Auld*, 5 Cranch (U. S.), 262, 3 L. Ed. 96 (Marshall, C. J.: "This partition would unquestionably have been protected in equity, and the majority of the court conceive that after such a lapse of time, and such a long separate possession, a deed of partition ought to be presumed"); *Munroe v. Gates*, 48 Me. 463 (several mill privileges originally owned together but occupied by different persons in severalty—an ancient partition inferred by the court); *Russell v. Marks*, 3 Met. (Ky.) 37; *Lloyd v. Gordon*, 2 Har. & McH. (Md.) 254 (tenants in common); *Jackson v. Miller*, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316 (where a tract of land held in common has

been subdivided into lots, and one of the lots has long been known and called by the name of one of the tenants in common, and there is no evidence of any subsequent claim of a tenancy in common, it may fairly be inferred that there has been a partition and that such lot was set off to him whose name it bears.

⁶⁹ *Williams v. Green*, 111 Va. 205, 68 S. E. 253; *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Field v. Brown*, 24 Gratt. (Va.) 74; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182.

⁷⁰ *Eldridge v. Knott*, 1 Cowp. 215, 98 Eng. Reprint, 1050; *Hillary v. Waller*, 12 Ves. 252, 33 Eng. Reprint, 96; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427, 30 Am. Dec. 274.

tracts of sale of land have been made, and the vendee has taken possession and paid the purchase money, the conveyance has been presumed.⁷¹ *Acts of parliament and of the legislature* may be presumed to support a title after long possession, even though the public records furnish no evidence of such act; but there could be no presumption of such an act if, under the constitution of the state, no such act could be properly passed.⁷² Where possession for the requisite time has been shown and also that during the time certain conditions have been performed by those in possession, it may be presumed that there was a *grant on condition*.⁷³ In ejectment, where the defendant has had long possession, the presumption is not limited to a grant from the plaintiff, but it may be of a *grant from his remote grantor*.⁷⁴ After long possession of land under a deed executed in the name of an agent it will be presumed that he had authority from the principal.⁷⁵

§ 76a (73, 74). Same—Other illustrations.—Other illustrations are here afforded of cases in which the presumption of a pre-existing grant or deed was raised to support a long-established position. It has been held that after long user, a ferry had a legal origin;⁷⁶ that the record of

⁷¹ *Jackson v. Murray*, 7 Johns. (N. Y.) 5.

⁷² *Attorney General v. Eveline Hospital*, 17 Beav. 366, 51 Eng. Reprint, 1075; *McCarty v. McCarty*, 2 Strob. (S. C.) 6, 47 Am. Dec. 585; *Lopez v. Andrew*, 3 Man. & Ry. 329, and note.

⁷³ *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Mitchell v. Walker*, 2 Aikens (Vt.), 266, 16 Am. Dec. 710.

⁷⁴ *Casey v. Inloes*, 1 Gill (Md.), 430, 39 Am. Dec. 658.

⁷⁵ *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; *Stockbridge v. West Stockbridge*, 14 Mass. 257.

⁷⁶ *Trotter v. Harris*, 2 Younge & J. 285; *Bird v. Smith*, 8 Watts (Pa.), 434, 34 Am. Dec. 483 (while it is true the Susquehanna river is a public highway, the term "ferry" includes not only the common right of all citizens to use the waters of the river, but also the right of landing upon both banks. Now, the *riparian* owners are bounded by the low-water mark, and he who owns the land owns also the right of landing upon it, and although there may be no exclusive right to the use of the waters of the river, yet there may be an exclusive right to the land on both sides down to low-water mark, and so an exclusive right to a ferry); *Smith v. Harkins*, 3 Ired. Eq. (N. C.) 613, 44 Am. Dec. 83.

a statute of incorporation had been lost;⁷⁷ that after long enjoyment there had been a grant of fishery;⁷⁸ or of the right of way;⁷⁹ or of the right to hold meetings in a parish house;⁸⁰ that a power of attorney had existed where a deed had been made by one purporting to be by an attorney;⁸¹ that a lease of land for the life of the lessee had existed, where a sufficient foundation for the presumption was laid;⁸² that a grant of water flowing through an aqueduct had been duly executed.⁸³ The presumption has often been applied in cases where there has been adverse possession of *watercourses*, not navigable, or of land overflowed on account of the erection of dams;⁸⁴ but this rule has no application to underground waters percolating or filtering through the earth.⁸⁵ It is also presumed that, where there are *several in possession*, the law refers the possession to the one who has the title;⁸⁶ that the soil of one owner is entitled to the natural support of the adjoining soil;⁸⁷ and

⁷⁷ *Stockbridge v. West Stockbridge*, 12 Mass. 400 (incorporation of a town).

⁷⁸ *Melvin v. Whiting*, 10 Pick. 295, 20 Am. Dec. 524; *Carter v. Tinicum Fishing Co.*, 77 Pa. 310 (presumptions arising from great lapse of time and nonclaim are admitted sources of evidence, which a court is bound to submit to a jury as the foundation of title by conveyances long since lost or destroyed).

⁷⁹ *Hill v. Crosby*, 2 Pick. (Mass.) 466, 13 Am. Dec. 448.

⁸⁰ *Goff v. Rehoboth*, 12 Met. (Mass.) 26.

⁸¹ *Buhols v. Boudousquie*, 6 Mart., N. S. (La.), 153; *Doe v. Campbell*, 10 Johns. (N. Y.) 475; or that a *lease* in fee: *Ham v. Schuyler*, 4 Johns. Ch. (N. Y.) 1.

⁸² *Sellick v. Starr*, 5 Vt. 255.

⁸³ *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

⁸⁴ *Bcaley v. Shaw*, 6 East, 208, 102 Eng. Reprint, 1266; *Magor v. Chadwick*, 11 Adol. & El. 571, 113 Eng. Reprint, 532; *Watkins v. Peck*,

13 N. H. 360, 40 Am. Dec. 156; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Strickler v. Todd*, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649; *Campbell v. Smith*, 3 Halst. (N. J. L.) 140, 14 Am. Dec. 400; but see *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Hall v. Augsbury*, 46 N. Y. 622; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Tinkham v. Arnold*, 3 Me. 120.

⁸⁵ *Frazier v. Brown*, 12 Ohio St. 294; *Chasemore v. Richards*, 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

⁸⁶ *Maples v. Maples*; *Rice Eq. (S. C.)* 300.

⁸⁷ *Humphries v. Brogden*, 12 Q. B. 739, 116 Eng. Reprint, 1048; *Harris v. Ryding*, 5 Mees. & W. 60; *Roberts v. Haines*, 6 El. & B. 643, 119 Eng. Reprint, 1003; *Rowbotham v. Wilson*, 6 El. & B. 593, 119 Eng. Reprint, 985. See, also, exhaustive note on the rights of the owner of the surface as against the owner of minerals thereunder appended to the case of *West Pratt Coal Co. v. Dorman*, 161 Ala. 389, 135 Am. St. Rep. 127,

that one who has allowed the continuous use of his land as a highway has intended to dedicate the same.⁸⁸ Grants may be presumed from the government as well as from individuals, and upon the same principle.⁸⁹ Throughout the whole of these illustrations, however, it is to be noted that while the presumption of a pre-existing deed or grant is raised, it is always the pre-existence of such a deed or grant as is consistent with the proved facts of occupation and claim; and therefore the mere fact that one occupied land, unaccompanied by evidence that the occupation was under a claim of title, creates no legal presumption that his occupation is under any particular deed.⁹⁰

§ 77 (75). Presumption not superseded by statutes of limitation.—From the fact that the presumption was created so early by the court of chancery, and was limited in its application, it might be inferred that the enactment of the statutes of limitation would have obviated the necessity for continuing it. As we have just shown, originally this presumption of title from possession was applied only to incorporeal hereditaments, but it is now well settled that the same presumption will arise whether the grant relates to *corporeal or incorporeal hereditaments*.⁹¹ Nor is this rule changed by the fact that, in most cases where possession is relied upon as a source of title to lands and tenements, the statute of limitations of the jurisdiction affords a sufficient guide.⁹² The party relying on his possession

23 L. R. A., N. S., 805, 18 Ann. Cas. 750, 49 South. 849.

⁸⁸ Wyman v. State, 13 Wis. 663; Reg. v. East Mark, 11 Q. B. 877, 116 Eng. Reprint, 701; Rex v. Petrie, 24 L. J. Q. B. 167, 4 El. & Bl. 737, 3 C. L. R. 829, 1 Jur., N. S., 752, 3 Week. Rep. 243, 6 Cox C. C. 512, 119 Eng. Reprint, 272; 2 Beach, Pub. Corp., § 1451 and cases.

⁸⁹ Oaksmith v. Johnston, 92 U. S. 343, 23 L. Ed. 682; United States v. Chavez, 175 U. S. 509, 44 L. Ed. 255, 20 Sup. Ct. Rep. 159. As to adverse possession of public property, see note to Schneider v. Hutchinson, 35

Or. 253, 76 Am. St. Rep. 474, 57 Pac. 324, on adverse possession of public property.

⁹⁰ McCleery v. Lewis, 104 Me. 33, 70 Atl. 540, 19 L. R. A., N. S., 438.

⁹¹ Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. Ed. 398; Fletcher v. Fuller, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667; Arnold v. Stephens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305, 1 Morr. Min. Rep. 176.

See § 76, *ante*.

⁹² Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. Ed. 398; Fletcher v. Fuller, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667.

may, of course, call to his aid the statute of limitations where it is applicable, and if he relies upon the statute, the proofs must show compliance with its provisions.⁹³ But the *statutes of limitations do not supersede the common-law presumption*, and, if this is relied upon, possession for less than the period prescribed by the statute may, with other cogent circumstances, sustain the claim of a conveyance or of a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not definite, but depends on its peculiar circumstances.⁹⁴ It may be necessary to seek the aid of this presumption in some cases where the *statute of limitations does not apply*, as where it is urged against the state, or when from some peculiar relations of the parties there could not have been adverse possession originally, or where the presumption may be relied upon to supply a conveyance or other missing link, or where it relates to an incorporeal hereditament or to an easement.⁹⁵ The presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time but had neglected to obtain and of which the witnesses have passed away, or their recollection of the transaction has been dimmed and imperfect. "And hence," said Mr. Justice Field,⁹⁶ "as a general rule, it is only where the possession has been actual, open and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land,

⁹³ *Lowe v. Carpenter*, 6 Ex. 825; *Eldridge v. Knott*, 1 Cowp. 214, 98 Eng. Reprint, 1050.

⁹⁴ *Bright v. Walker*, 1 Comp. M. & R. 211; *Stamford v. Dunbar*, 13 Mees. & W. 822; *Hanmer v. Chance*, 4 De Gex, J. & S. 626, 46 Eng. Reprint, 1061; *Fletcher v. Fuller*, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667; *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 110, 5 L. Ed. 398.

See, also, *Townsend v. Downer*, 32 Vt. 183, which contains a useful opinion collecting the important decisions.

⁹⁵ Cowen & Hill's Notes to Phil. Ev., and cases, note 298; *State v. Dickson*, 129 Mich. 221, 88 N. W. 621.

⁹⁶ *Fletcher v. Fuller*, 120 U. S. 534, 30 L. Ed. 759, 764, 7 Sup. Ct. Rep. 667.

that the presumption of a deed can be invoked. But the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership."⁹⁷ It may be well here to point the distinction which suggests itself from a perusal of the cases. At first sight, there appears no clear reason why in the one case the claimant should rely on prescription and in the other on the statute of limitations. There should be no confusion between them, and the sole cause of the confusion is the adoption of the period named in the statute of limitations as a guide merely for the court. When the claim is based on possession and the spectre of a title, the law usually materializes the spectre for the claimant, and may use the period named in the statute for guidance and comparison with that which the claimant exhibits; when the claim is based on adverse possession, which by its very terms excludes any shadowy base of claim (for it is on the physical opposition to all claims—the original seizure of the neglected right of some other person), then the statute of limitations is called into operation and the claim must proceed in the course therein laid out. Where mere adverse possession is to pass the title and bar a recovery, the statute of limitations has by express provision specified the length of time for which such possession must continue, and if courts were to presume a grant solely upon the ground of adverse possession for a period less than the statute provides, and so bar a recovery by the true owner, the statute would be defeated.⁹⁸

⁹⁷ Mr. Justice Story says in *Green v. Lister*, 8 Cranch (U. S.), 249, 3 L. Ed. 552: "In the simplicity of ancient times there were no means of ascertaining titles but by the visible seisin; and, indeed, there was no other mode between subjects of passing title but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seised he had a perfect investiture, and if ousted could main-

tain his action for the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety; to prevent frauds upon the land and upon the other tenants."

⁹⁸ *Townsend v. Downer*, *supra*. This doctrine was set forth by Lord Mansfield in *Eldridge v. Knott*, 1 Cowp. 214, 98 Eng. Reprint, 1050, and is now universally recognized: 2

§ 78 (76). Presumption that trustees have made proper conveyances.—It stands to reason that if the law will raise the presumption of a conveyance from a stranger to the ancestor or predecessor in title of a claimant, it will also raise it where the legal owner of the property stood to the equitable owner in the relation of trustee and *cestui que trust*. Such is in fact the law, and it may be stated as a rule of much importance and of quite general application that, when a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.⁹⁹ Lord Mansfield said that when trustees ought to convey to the beneficial owner he would leave it to the jury to presume, where such presumption might reasonably be made, that they had conveyed accordingly, “in order to prevent a just title from being defeated by a matter of form.”¹⁰⁰ The circumstances which should concur to raise this presumption as to the trustees are the following: (1) It must have been the duty of the trustee to convey.¹ (2) There must be sufficient reason to

Phil. Ev., Cowan & Hill's Notes, p. 356; 1 Greenleaf on Ev., § 17; Wells & Wife v. Morse, 11 Vt. 9; Sumner v. Child, 2 Conn. 607. And also that in case of the claim by long possession under a title which formerly existed, or ought to have existed, that the accompanying circumstances which are relied upon in aid of the long possession must be consistent with such possession and with the fact to be presumed is abundantly settled by all the authorities: Wells v. Morse et al., 11 Vt. 10; Doe v. Cooke, 6 Bing. 174; Sellick v. Starr, 5 Vt. 255; Ricard v. Williams, 7 Wheat. (U. S.) 109, 5 L. Ed. 398.

⁹⁹ Reynold's Steph. Ev., art. 101; Doe v. Cooke, 6 Bing. 174; Jackson v. Cole, 4 Cow. (N. Y.) 587; Jackson v. Moore, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; Marr v. Gilliam, 1 Cold. (Tenn.) 488; Tyler v. Herring,

67 Miss. 169, 19 Am. St. Rep. 263, 6 South. 840, and note. For discussion of the rule with qualifications, see Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464, and note. See note to Eakle v. Ingram, 100 Am. St. Rep. 104.

¹⁰⁰ Lade v. Holford, Bull N. P. 110. This case was approved and the doctrine applied by Lord Kenyon in England v. Slade, 4 Term Rep. 682, 100 Eng. Reprint, 1243.

¹ Where a trustee is under no obligation to convey to the *cestui que trust* the jury will not be directed to presume a conveyance: Beach v. Beach, 14 Vt. 28, 39 Am. Dec. 204. But where the beneficial owner has for a long period dealt with the property as if possessed of the legal fee, it will be presumed that a conveyance has been executed: Noel v. Bewley, 3 Sim. 103, 57 Eng. Reprint,

justify the presumption.² (3) The object of the presumption must be to support a just title.³ The case must be clearly such that a court of equity, if called upon, would

938. Where there is an express direction in the trust instrument for a conveyance of the legal estate by the trustee at a certain time specified, the duty of the trustee to make the conveyance becomes cogent, and the presumption of his having made it will be readily entertained: *Hill on Trustees*, 255; *Hillary v. Waller*, 12 Ves. 239, 33 Eng. Reprint, 96; *England v. Slade*, 4 Term Rep. 682, 100 Eng. Reprint, 1243; *Doe v. Sybourn*, 7 Term Rep. 2, 101 Eng. Reprint, 823; *Wilson v. Allen*, 1 Jac. & W. 611, 37 Eng. Reprint, 501. A trustee ordinarily takes no greater estate than is needed to support his trust; and the extent of the legal interest the trustee takes in the estate is to be determined, not by words of inheritance, or otherwise, but by the object and extent of the trust upon which the estate is given; and when its objects are fully accomplished, the title of the trustee ceases, and the entire title, legal and equitable, passes by operation of law to the *cestui que trust*: *Schaffer v. Lavretta*, 57 Ala. 14; *Nicoll v. Walworth*, 4 Denio (N. Y.), 385. Thus where property was conveyed to a trustee for the sole and separate use of a married woman, it was held that on the death of her husband the use became immediately executed in the widow: *Roberts v. Mosely*, 51 Mo. 282. Mere length of time, as between trustee and *cestui que trust*, affords no ground for the presumption of a conveyance from the trustee to the *cestui que trust*: *Perry on Trusts*, § 349; *Keene v. Deardon*, 8 East, 248, 103 Eng. Reprint, 336; *Goodson v. Ellisson*, 3 Russ. 583, 38 Eng. Reprint, 694; *Hillary v. Waller*, 12 Ves. 239, 33 Eng. Reprint, 96;

Doe v. Langdon, 12 Q. B. (64 Eng. Com. L.) 719, 116 Eng. Reprint, 1040; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694. In *Moore v. Jackson*, it was held that after a lapse of thirty-two years a release to a *cestui que trust* by a trustee would be presumed, as against the heirs at law of the latter.

² Length of time, though not of itself sufficient ground for raising the presumption, is nevertheless an important circumstance to which much weight is attached. So continued possession by the *cestui que trust*, though not in general a sufficient reason in itself for presuming a conveyance by the trustee, because such possession is not inconsistent with the trustee's title, may, in connection with other even slight circumstances, be sufficient to justify the presumption: *Hill on Trustees*, 256; *Doe v. Langdon*, 12 Q. B. (64 Eng. Com. L.) 719, 116 Eng. Reprint, 1040; *Keene v. Deardon*, 8 East, 248, 103 Eng. Reprint, 336; *Hillary v. Waller*, 12 Ves. 239, 33 Eng. Reprint, 96; *Goodson v. Ellisson*, 3 Russ. 583, 38 Eng. Reprint, 694.

³ The presumption will only be made in favor of a just title, and to prevent that title from being defeated: *Hill on Trustees*, 262; *Doe v. Cooke*, 6 Bing. 174; *Tenny v. Jones*, 10 Bing. 75. In the case of *Doe v. Cooke*, 6 Bing. 179, *Tindal, C. J.*, said: "No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with

decree a reconveyance. In dealing with a case of an executory trust deed which had become void from the impossibility of performing its conditions, Mr. Justice Swayne said:⁴ "The present case is within these categories. The trustees being bound to reconvey, it is to be presumed they discharged that duty, rather than that they violated it by continuing to hold on to the title. The trust was executory. When its execution became impossible, common honesty, their duty, and the law required that they should at once give back to the donor the legal title which he had given to them. It is not necessary that the presumption should rest upon a basis of proof or conviction that the conveyance had in fact been executed. It is made because right and justice require it. It never arises where the actual conveyance would involve a breach of duty by the trustee or wrong to others. Like the doctrine of relation, it is applied only to promote the ends of justice, never to defeat them." The rule is firmly established in the law,⁵ and is equally well settled in American jurisprudence.⁶ In this class of cases where the period has elapsed during which the trustees should have conveyed, it is not necessary that

the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed." The comments on these three sets of circumstances are taken from one of the late A. C. Freeman's luminous notes appended to the case of *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464.

⁴ *French v. Edwards*, 21 Wall. (U. S.) 147, 22 L. Ed. 534, followed in *French v. Edwards*, 5 Saw. 266, Fed. Cas. No. 5098, where the court said it must have been evident to the court that there had in fact been no reconveyance, and the court would scarcely have sent the case back on that point under these circumstances, if it had not deemed the presumption conclusive. The presumption in this class of cases is either conclusive or useless; and if useless, it might as well not be indulged. The ends of justice in such cases, doubt-

less, require the presumption; but if so, they require it to be indisputable. The court, therefore, acted upon that view. See, also, *Weisenberg v. Truman*, 58 Cal. 63, dissenting opinion of *McKee, J.*; *Lincoln v. French*, 105 U. S. 614, 26 L. Ed. 1189.

⁵ *Langley v. Sneyd*, 1 Sim. & St. 55, 57 Eng. Reprint, 18; *Hillary v. Waller*, 12 Ves. 252, 33 Eng. Reprint, 96; *Goodson v. Ellisson*, 3 Russ. 588, 38 Eng. Reprint, 694; *Doe v. Sybourn*, 7 Term Rep. 3, 101 Eng. Reprint, 823; *Angier v. Stanard*, 3 Myl. & K. 571, 40 Eng. Reprint, 216; *Carteret v. Paschal*, 3 P. Wms. 198, 24 Eng. Reprint, 1028.

⁶ *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *Jackson v. Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Moore v. Jackson*, 4 Wend. (N. Y.) 62; *Aikin v. Smith*, 1 Sneed (Tenn.), 104; Washb. Real Prop. 415, and n.

twenty years or any other certain period should have expired.⁷ It is a familiar rule that in general *length of time is no bar to a trust* whose existence has been clearly proved; and where fraud is imputed and proved, no length of time ought to exclude relief. But as length of time obscures evidence and deprives parties of the means of ascertaining the nature of the original transactions, it operates by way of presumption in favor of innocence and against the imputation of fraud. Accordingly, in a leading case it was held that the lapse of forty years, together with the death of all the original parties, was sufficient to warrant a presumption of the discharge and extinguishment of a trust proved to have existed by strong circumstances. "We think," says Mr. Justice Story,⁸ "therefore, that the true and safe course is to abide by the rule of law, which, after a lapse of time, will presume payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. The doctrine in *Hillary v. Waller*,⁹ on this subject, meets our entire approbation." It is there said, that general presumptions are raised by the law, upon subjects of which there is no record or written instrument, because there are no means of creating belief or disbelief, and because mankind, judging of matters of antiquity from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief, which can hold only as to matters within our own time, upon which a conclusion can be formed from particular and individual knowledge.

§ 79 (77). Nature of the possession required—Where possession supported by claim of title.—It will be recognized that the same degree of evidence cannot be called for

⁷ *Jackson v. Woolsey*, 11 Johns. (N. Y.) 446; *England v. Slade*, 4 Term Rep. 682, 100 Eng. Reprint, 1243. See cases and discussion, Cowen & Hill's Notes to Phil. Ev., note 298.

⁸ *Prevost v. Gratz*, 6 Wheat. (U. S.) 481, 5 L. Ed. 311, cited and applied in a long line of cases set forth with comments in 2 Notes on United States Reports, 92.

⁹ 12 Ves. 261, 266, 33 Eng. Reprint, 100.

when the claim is founded on title, however obscure, as when it is based only on possession adverse to the world disclaiming all right save that of possession by occupancy alone. It therefore becomes necessary to discuss the nature of the possession which creates the presumption that a grant has been made or that some other missing link to the title has been supplied. Though, as has been seen, the courts have been ready to relax the strict rules of evidence in favor of long possession, they have sought to apply this presumption, not capriciously, but in conformity with uniform rules. The nature of the possession required, where it is supported by claim of title, has to a large extent been hereinbefore dealt with, and it suffices to say here that where the plaintiff proves prior and peaceable possession under a claim and color of title, entry and ouster by the defendant, without a pretense of title, will not be upheld, even though the defendant seek to justify his entrance by proof of a deed from someone who had no title to the premises; and this is so, although at the time of such entry the lands were apparently vacant and actually unoccupied.¹⁰ Nor is it material that the plaintiff, in addition to proof of prior possession, also gave proof of a record title which defendant claims is not valid. He is still entitled to recover on proof of his prior possession, where the defendant is simply an intruder and has no color of title.¹¹ The supreme court of the United States, speaking in a case from Texas arising under a Mexican title, said: "According to the set-

¹⁰ *Sabariego v. Maverick*, 124 U. S. 261, 298, 31 L. Ed. 430, 444, 8 Sup. Ct. Rep. 461; *Bradshaw v. Ashley*, 180 U. S. 59, 45 L. Ed. 423, 21 Sup. Ct. Rep. 297. See excellent note appended to last-named case on possession as sufficient evidence of title to support ejectment against having no better right.

¹¹ *Bradshaw v. Ashley*, *supra*. As was said by Pollock, Chief Baron, in *Davison v. Gent*, 1 Hurl. & N. 744, 38 Eng. L. & Eq. 469, if a party has a right to maintain an action of ejectment, by reason of his posses-

sion, and attempts also to show title, and discloses a flaw in it, he may still recover by reason of his possession. He may say, "I claim to recover both by reason of my title and my possession; and failing in one I will rely upon the other." His prior possession is good in any event, as against a trespasser entering without right. *Bramwell and Watson*, BB., were of the same opinion. See, also, *Asher v. Whitlock*, L. R. 1 Q. B. 1, 5, opinion by Cockburn, C. J., and concurred in by Mellor and Lush, JJ., decided in 1865.

tled principles of the common law, this is not a defense to the action. The plaintiff says he was seised in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seised and eject him, and then question his title or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title. He may do so by a writ of entry, where that remedy is still practiced, or by an ejectment, or he may maintain trespass. Nor is there anything in the form of the remedy in Texas which renders these principles inapplicable to this case."¹²

§ 79a (77). Nature of the possession required—Where possession not supported by any claim of title.—Where the claimant relies on his possession, that is, his adverse possession, the rule is, however, different. It is clear that the burden is upon the one who claims title by adverse possession against a documentary title to prove such possession for the requisite time by *clear and satisfactory evidence*. It will not be presumed.¹³ Indeed, it has been said that the

¹² Sabariego v. Maverick, 124 U. S. 261, 31 L. Ed. 430, 8 Sup. Ct. Rep. 461; Jackson v. Boston & W. R. R. Corp., 1 Cush. (Mass.) 575; or by an ejectment (Allen v. Rivington, 2 Wms. Saund. 111, 85 Eng. Reprint, 813; Doe v. Reade, 8 East, 356, 103 Eng. Reprint, 378; Doe v. Dyson, 1 Moo. & M. 77; Jackson v. Hazen, 2 Johns. (N. Y.) 438; Whitney v. Wright, 15 Wend. (N. Y.) 171); or he may maintain trespass (Catteris v. Cowper, 4 Taunt. 548; Graham v. Peat, 1 East, 246, 102

Eng. Reprint, 95). Sabariego v. Maverick, *supra*, and Bradshaw v. Ashley, *supra*, contain all the cases of note upon the subject, the law having been collected with great accuracy. The former case is cited in Pacific Bank v. Hannah, 90 Fed. 80, 32 C. C. A. 522, to the same point.

¹³ Baldwin v. Buffalo, 35 N. Y. 375; Budd v. Brooke, 3 Gill (Md.), 198, 43 Am. Dec. 321; Casey v. Inloes, 1 Gill (Md.), 430, 39 Am. Dec. 658; Hurst's Lessee v. McNeil, 1 Wash. C. C. 70, Fed. Cas. No. 6936.

possession should be proved beyond a reasonable doubt.¹⁴ But there seems to be no good reason for requiring the strictness of proof demanded in the criminal law. The possession must be *actual and not constructive* in its nature; while the payment of taxes and similar acts of control may be evidence of the claim of right, they are not alone sufficient evidence of possession within the meaning of the rule.¹⁵ It must be a possession subjecting the land to the will and dominion of the occupant; it must be evidenced by those things essential to its beneficial use, and must be clearly defined, open, notorious and continuous. It must be evidenced by acts indicating permanency of occupation.¹⁶ Moreover, the possession must be *hostile* in its inception, and *exclusive*, and it must continue uninterruptedly under a claim of right to the boundaries of the land claimed;¹⁷ and where the title is evidenced by possession only, it must be *limited to the claim asserted*.¹⁸ So where a party is in actual possession and has right to possession

¹⁴ Rowland v. Updike, 28 N. J. L. 101.

¹⁵ Jackson v. Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; Pharis v. Jones, 122 Mo. 125, 26 S. W. 1032; Pendleton v. Snyder, 5 Tex. Civ. App. 427, 24 S. W. 363.

¹⁶ Jackson v. Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; Borel v. Rollins, 30 Cal. 408; Polack v. McGrath, 32 Cal. 15; Courtney v. Turner, 12 Nev. 345; Seymour v. Creswell, 18 Fla. 29; Burke v. Hammond, 76 Pa. 172. Personal residence, cultivation, or improvement is not necessary: Barstow v. Newman, 34 Cal. 90. The possession may be acquired through the agency of a tenant: McLawrin v. Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563. Protection of the land by a substantial inclosure sufficient to turn stock, without residence or improvement, is enough: Polack v. McGrath, 32 Cal. 15; Southmayd v. Henley, 45 Cal. 101; not so where the inclosure is insufficient: Borel v. Rollins, 30 Cal. 408;

Polack v. McGrath, 32 Cal. 15; Baldwin v. Simpson, 12 Cal. 560; especially as against one in possession of part under a conveyance of the whole tract: Baldwin v. Simpson, *supra*. See, also, Wolf v. Baldwin, 19 Cal. 306. Actual inclosure of meadow land is not essential to actual possession where the circumstances of the country do not require inclosure: Courtney v. Turner, 12 Nev. 345.

¹⁷ Brandt v. Ogden, 1 Johns. (N. Y.) 156; Williams v. Donell, 2 Head (Tenn.), 695; Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305, 1 Morr. Min. Rep. 176; Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115; Fletcher v. Fuller, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667. The nature of the adverse possession must be an actual, visible, notorious, distinct, and hostile possession: Washburn on Real Property, § 1962, and cases there cited.

¹⁸ Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. Ed. 398.

under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not be presumed to be adverse.¹⁹ The possession should be accompanied with such acts of ownership as persons usually exercise over their own lands, such acts that the owner knowing of them must be deemed to understand that a claim is made adverse to his own.²⁰

§ 80 (78). Same—Changes in possession—Possession by tenant.—It by no means follows that the continuity of possession shall be absolutely and literally unbroken without interference with the presumption of the lawful origin of the right. This presumption may, therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted during the period necessary to create a title by adverse possession if, in addition to the actual possession, there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which, under proper instructions, may be left to the jury.²¹ Where there is evidence of a prescriptive claim extending over a long time, the presumption of right will not be defeated by proof of slight, partial or occasional variations in the exercise or the extent of the right claimed.²² *Slight changes* in the nature or extent of long possession are almost inevitable; and when by the lapse of years the evidence is lost by which such changes or irregularities might be explained, the courts cannot scrutinize such ancient pos-

¹⁹ *Nicohls v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 239.

²⁰ *Doe v. Maxwell*, 10 Ired. (N. C.) 110, 51 Am. Dec. 380; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Pownal v. Taylor*, 10 Leigh (Va.), 172, 34 Am. Dec. 725; *Colvin v. Warford*, 20 Md. 357.

²¹ *Fletcher v. Fuller*, 120 U. S. 534, 30 L. Ed. 759, 7 Sup. Ct. Rep. 667.

²² *Reg. v. Archdall*, 8 Adol. & El. 281, 112 Eng. Reprint, 843; *Welcome v. Upton*, 6 Mees. & W. 536; *Fletcher v. Fuller*, 120 U. S. 534 30 L. Ed. 759, 7 Sup. Ct. Rep. 667.

session as strictly as they might a modern grant. It has, therefore, always been the well-established principle of our law to presume everything in favor of long possession, and it is every-day practice to rest the title to the most valuable properties upon this foundation.²³ While the possession must be open and such as subjects the premises to the dominion of the possessor, such control may be exercised through the agency of a *tenant* or another recognizing the right of the one claiming control.²⁴ Although the exclusive possession of one tenant in common is presumed not to be adverse to the *cotenant*, but rather for his benefit,²⁵ yet the ouster of the cotenant may be proved, and may be inferred from such circumstances as claiming the whole rent, denying the right of the other party, or by abandonment by those not in possession; in such cases it may be a question for the jury whether the possession has become adverse,²⁶ and whether there has been a grant.²⁷ "A mere *tortious possession*, however, obtained by violence is not possession in the meaning of the rule before us; and, against such a wrongdoer, the party wrongfully dispossessed may make out a *prima facie* case in an action for ejectment, on proof of a prior possession, however short."²⁸ It is clearly to be understood that possession does not mean actual possession for every mathematical division of time. "The evidence must show a continuous possession, or at least that it was not abandoned to entitle a plaintiff to recover merely by virtue of such possession."²⁹ That is to say, the defendant's pos-

²³ Reg. v. Archdall, 8 Adol. & El. 281, 112 Eng. Reprint, 843.

²⁴ Barstow v. Newman, 34 Cal. 90; McLawrin v. Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563.

²⁵ Co. Litt. 199; Colburn v. Mason, 25 Me. 434, 43 Am. Dec. 292; McClung v. Ross, 5 Wheat. (U. S.) 116, 5 L. Ed. 46; Dubois v. Campau, 28 Mich. 304; Phillips v. Gregg, 10 Watts (Pa.), 158, 36 Am. Dec. 158. See, also, Wilcox v. Leominster Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136.

²⁶ Meredith v. Andres, 7 Ired. (29 N. C.) 5, 45 Am. Dec. 504; Harmon v. James, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296. See, also, Bolton v. Hamilton, 2 Watts & Serg (Pa.) 294, 37 Am. Dec. 509.

²⁷ Hepburn v. Auld, 5 Cranch (U. S.), 262, 3 L. Ed. 96; Kingston v. Lesley, 10 Serg. & R. (Pa.) 383.

²⁸ Asher v. Whitelock, L. R. 1 Q. B. 1; Clifton v. Lilley, 12 Tex. 130; White v. Cooper, 8 Jones (53 N. C.), 48; Weston v. Higgins, 40 Me. 102.

²⁹ Wilson v. Palmer, 18 Tex. 592, 595.

session is, in the first instance, presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive possession. If the lands, when entered upon by the defendant, were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his actual possession was not abandoned; otherwise, he cannot be said to have had even a constructive possession.³⁰

§ 81 (79). The presumption — How rebutted.—At the risk of reiteration, it must be repeated here that all these

³⁰ *Sabariego v. Maverick*, 124 U. S. 261, 31 L. Ed. 430, 8 Sup. Ct. Rep. 461. In *Smith v. Lorillard*, 10 Johns. (N. Y.) 356, Kent, C. J., said: "It is, however, to be understood, in the cases to which the rule of evidence applies, that the prior possession of the plaintiff had not been voluntarily relinquished without the *animus revertendi* (as is frequently the case with possession taken by *squatters*), and that the subsequent possession of the defendants was acquired by mere entry, without any lawful right. That the first possession should in such cases be the better evidence of right seems to be the just and necessary inference of law. . . . This presumption of right every possessor of land has in the first instance; and after a continued possession for twenty years under pretense or claim of right, the

actual possession ripens into a right of possession which will toll an entry; but until the possession of the tenant has become so matured, it would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned as *derelict*, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession; and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession by showing a regular legal title or a right of possession."

presumptions are in fact disputable presumptions, and it must be taken that it follows logically from the foregoing discussion that long-continued possession of corporeal or incorporeal hereditaments only furnishes a presumption of a legal title, which may be repelled or rebutted by other circumstances. Where the circumstances attending the use of a way demonstrate that its enjoyment was by mere favor, and that it was never claimed as a right, but, on the contrary, was treated as a privilege that could be withdrawn at pleasure, the fact that the time of enjoyment is used merely by way of evidence to raise the presumption of a grant, and the manner of the enjoyment, that is, that it was by mere favor, and was not claimed and exercised as a right, may be used as evidence to rebut that presumption.³¹ To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right or by such acts as manifest an intention to enjoy it without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owner of the soil.³² Where the use is permissive, and accompanied by such a distinct acknowledgment of right in another as the payment of rent implies, and interrupted by change of claimants, without transfer of title, the presumption of a grant is entirely rebutted.³³ So the presumption which the law raises in favor

³¹ *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

³² *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 100. The occasional cutting of timber and boiling of sugar on land by the occupier of an adjoining tract is not such a possession as will give title under the statute of limitations: *Washabaugh v. Entriken*, 34 Pa. 74. Neither will the mere throwing of manure on another's land

constitute such a possession as will give any right under the statute to him who does, much less to a third person: *Shroder v. Breneman*, 21 Pa. 225; and see, also, the note to *Wright v. Guier*, 36 Am. Dec. 115, referring to other cases in this series where the subject has been treated fully.

³³ *McCullough v. Wall*, 4 Rich. (S. C.) 68, 53 Am. Dec. 715; *County of Susquehanna v. Deans*, 33 Pa. 131.

of the actual occupant may be destroyed by proof of his having a lease or evidence of his having paid rent, or acknowledged the title set up;³⁴ or by the circumstance that the adverse use was *not acquiesced in* and was contested; or that possession was taken by virtue of some qualified interest or estate less than a claim of an absolute title or subordinate to the rights of the owner.³⁵ Where the presumption of a grant is raised by parol evidence, it may be rebutted by evidence of the same kind.³⁶ That parol evidence to rebut should be permissible when parol evidence to sustain is admissible is almost axiomatic, although even so late as 1910 the right to prove adverse possession by parol was questioned, and, we need hardly add, answered emphatically.³⁷

³⁴ Nieto v. Carpenter, 21 Cal. 455; Field v. Brown, 24 Gratt. (Va.) 74. In La Frombois v. Jackson, 8 Cow. (N. Y.) 589, 617, 18 Am. Dec. 463, Viele, Sr., made these instructive remarks on the subject of rebuttal: The presumption which the law thus raises in favor of the actual occupant may be destroyed by proof of his having received a lease, or evidence of his having paid rent, or acknowledged the title set up; or it may be destroyed by showing that the occupant entered without pretending to any claim of right whatever; in which case the law adjudges the possession to be in subservience to the legal owner (Jackson v. Thomas, 16 Johns. 301); for he can derive no benefit from a legal presumption, who, by his own acts, shows that the presumption cannot apply; the fact that no claim of right was made, showing that none existed. Hence, a claim of right is necessary, not because the statute requires it, but because the want of such claim is evidence sufficient to destroy the legal presumption of right. The *quo animo* a possession is taken or held, furnishes the test of its character; and the intention being to be inferred

from circumstances, and being of the proper cognizance of the jury as a matter of fact, they will be warranted in inferring from the circumstances that no claim of right was made, and that the party entered for the benefit of the true owner, whenever he shall choose to assert his title. Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or a tacit disavowal of right on the part of the occupant; and it is in the latter case only that the law adjudges the possession of one to the benefit of another.

³⁵ Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Chiles v. Conley, 2 Dana (Ky.), 21.

³⁶ English v. Doe, 7 Ga. 387.

³⁷ Clark v. McAtee, 227 Mo. 152, 127 S. W. 37 (while it is true ordinarily the legal title to real estate cannot be proven by parol testimony, yet that is not universally so, especially where title is acquired by adverse possession).

§ 82 (80). **Same—Disabilities—Nature of estate—What facts are relevant.**—In the preceding section we have shown that the presumption is rebuttable by circumstances radiating from the adverse occupier. There are also circumstances more immediately connected with the owner of the legal title which tend as well to destroy it. For instance, the presumption does not arise when the owner is under a disability from insanity or other cause.³⁸ Infancy of the real owner will prevent the running of the statute against him,³⁹ and where the defendant claimed a prescriptive title on possession for seven years under color of title, and the plaintiffs in the case were minors, it was held that prescriptive rights could not ripen against them until the expiration of the statutory period after their majority;⁴⁰ nor does it arise against remaindermen or reversioners during the continuance of the particular estate.⁴¹ The statute of limitations will not run in favor of an occupant of land the title whereof is in the United States as against the entryman, until the latter's right to a patent has been completed by the performance on his part of every act entitling him to that conveyance.⁴² In the case of trustee and *cestui que trust*, the latter is protected until his disability disappears or while the trust subsisted.⁴³ An owner in possession is *presumed to hold under his fee* until it is shown that he holds under an estate adverse and not subordinate to his fee. Thus, where a widow had held long possession under a deed in fee from one of her husband's heirs for an undivided part of the land, it was held that no presumption

³⁸ Hunt v. Hunt, 3 Met. (Mass.) 175, 37 Am. Dec. 130; Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Mitchell v. Owings, 3 A. K. Marsh. (Ky.) 312; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

³⁹ Harris v. McCrary, 17 Idaho, 300, 105 Pac. 558.

⁴⁰ Brown v. Hooks, 133 Ga. 345, 65 S. E. 780; Whitaker v. Thayer (Tex. Civ. App.), 123 S. W. 1137, on rehearing, the court ruled a married woman's coverture was a sufficient

disability to prevent the accrual of title by adverse possession against her.

⁴¹ McCorry v. King, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; Tinney v. Wolston, 41 Ill. 215.

⁴² Kines v. Libby, 87 Neb. 113, 126 N. W. 869.

⁴³ Blackett v. Zeigler, 147 Iowa, 167, 125 N. W. 874; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; Wilson v. Greyn, 49 Iowa, 251.

could arise against the deed that she held as tenant in dower.⁴⁴ The possession of one defendant is of no avail to a codefendant as creating a presumption, where they claim under distinct titles.⁴⁵ There are various circumstances which may be relevant as showing whether or not the possession has been hostile and adverse, as the absence of the owner and his consequent ignorance of the adverse claim, or the unsettled condition of the country and consequent lack of notoriety of the claim.⁴⁶ But the presumption is not necessarily defeated by the mere ignorance or inattention of the owner as to the adverse claim, as the use may continue so long without objection as to warrant the inference of an implied consent or of a grant.⁴⁷ And it has been held that the presumption of a grant from long adverse possession was not rebutted by the fact that there was a prevalent opinion in the neighborhood as to the party's legal rights.⁴⁸ But if the owner have knowledge and stand by while title by possession is ripening in another, he cannot use his blemished title to rebut the presumption. The claim of title being established, the question of the notoriety of the claim, by the acts of ownership, is for the benefit of the party against whom the claim of title is asserted, and if the evidence shows that said party not only knew that the other party was claiming to own the land, but acquiesced in the claim by having sold the land by parol and recognizing the other party as the owner, the same evidence is not required to advise him of the possession by the other party as would be otherwise required. He would have the same notice of the extent of the claim of the other party, who was exercising dominion over a part of the land, as he would have if said party was acting under color of title.⁴⁹ "If the owner have actual knowl-

⁴⁴ *Hale v. Portland*, 4 Me. 77.

⁴⁵ *Casey v. Inloes*, 1 Gill (Md.), 430, 39 Am. Dec. 658.

⁴⁶ *Mitchell v. Owings*, 3 A. K. Marsh. (Ky.) 312; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, Fed. Cas. No. 6936; *Bethum v. Turner*, 1 Greenl. (Me.) 115, 10 Am. Dec. 36.

⁴⁷ *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744; *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610.

⁴⁸ *Casey v. Inloes*, 1 Gill (Md.), 430, 39 Am. Dec. 658.

⁴⁹ *Thompson v. Logan*, 166 Ala. 45, 51 South. 985.

edge that the possession is adverse to his title, the occupancy need not be open, visible, and notorious. Notoriety is important only where the adverse character of the possession is to be brought home to the owner by presumption."⁵⁰ The courts of this country have always felt that the English rules could not be applied here to the letter, more especially where the cases in which they were used related to claims of an almost personal nature, such as privileges or easements enjoyed by individuals and in which there was an exclusive enjoyment of the easement on the one side, and a knowledge of it and assent to it on the other. In England, where the decisions alluded to were made, the lands generally are under improvement, under the inspection of some landlord or his agent, where any encroachments on the land, or improper appropriation of it, must be known. There, if undue indulgence is shown and these encroachments acquiesced in, there is room for presumption of consent, or of a grant, to be allowed against those who will not guard their estates and protect them from legal conclusions affecting their rights.⁵¹ For this reason the cases in the books relating to this subject cannot be safely applied to lands, a great portion of which has never been improved, where proprietors reside at a distance; where settlements are made on small portions of large lots, without the knowledge of the owners, or any claim of title on the part of the settler, or where the usages of the country are such as to collect people near the margin of a river, for the more easy transportation or more ready sale of their lumber; and where the persons thus resorting have no intention to appropriate the banks of the river to any other than a temporary use, on account of the facilities thus furnished. So that a general usage, like that of depositing lumber on the banks of a river, accompanied by no claim of title, nor an intention to occupy the land in exclusion of the owner's rights, furnishes no presumption of a grant.⁵²

⁵⁰ 1 Cyc. 999; Trotter v. Neal, 50 Ark. 340, 345, 7 S. W. 384; Clark v. Gilbert, 39 Conn. 94, 97; Dausch v. Crane, 109 Mo. 323, 336, 337, 19 S.

W. 61; Thomson v. Thomson, 93 Ky. 436, 441, 442, 20 S. W. 373.

⁵¹ Bethum v. Turner, 1 Greenl. (Me.) 111, 10 Am. Dec. 36.

⁵² Bethum v. Turner, *supra*.

It may therefore be deduced as a safe rule for what evidence will be sufficient to repel the presumption, that if the owner, not being under legal disability, for in that case the law protects him, under all the circumstances knew or as a reasonable and prudent man ought to have known or made himself acquainted with the facts which jeopardized his right to his property, and simply from indolence or carelessness allowed rights to grow up out of the possession of his property by another for the statutory period, he cannot be heard in opposition to the claimant, provided always that the claimant has fulfilled those stringent conditions as to the nature of his occupancy and its open, notorious, and hostile and exclusive character which have been pointed out herein at length. Any effective precautionary act on the part of the owner, any legal exercise of his right of dominion, any want on the part of the adverse claimant in the performance of his act of aggression, any conduct consistent with a permissive occupation recognizing the owner, will be sufficient to repel the presumption of right upon which the claim to the property is founded.

§ 83 (81, 82). Presumption as to the law of sister states.

The more closely the states become connected by reason of the rapid interchange both of persons and letters, which in turn produce interchange as well of products greater than was ever dreamed of by the framers of the constitution, the more frequently does the question arise in the courts as to the law prevailing in some other state than that of the forum, where no evidence has been given on the subject. As appears from the discussion in another section, the courts do not in such cases take judicial notice of the foreign law.⁵³ It has been frequently declared without qualification that, in such cases, the *law of the sister state* will be presumed to be the *same as the law of the forum*.⁵⁴

⁵³ As to proof of laws of other states, see §§ 118 and 504, *post*.

⁵⁴ *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269; *McCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Cutler v. Wright*, 22 N. Y. 472;

Smith v. Whitaker, 23 Ill. 367; *Kermott v. Ayer*, 11 Mich. 181; *White v. Friedlander*, 35 Ark. 52; *In re Dunphy's Estate*, 147 Cal. 95, 81 Pac. 315; *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118; *Campbell*

If the decisions had rested upon that principle and applied it just as it is stated, no confusion need ever have arisen. A little prevision, however, would have disclosed that the states were not likely to remain passive under the common law, and that statutes would be passed by independent states differing according to local exigencies and consideration. The old rule, however, existed, and a strong inclination appears to have been evinced that it should not be abrogated. The result of the effort to alter the effect of it thus came about, though it was found that in many of the cases where the rule had been declared, the courts were dealing with common-law doctrines and not with statutory law. The general rule is that, in the absence of proof to the contrary, it will be presumed that the common law obtains in a sister state,⁵⁵ and is the same as the law of the

v. Campbell, 129 Iowa, 317, 105 N. W. 583; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 16 L. R. A. 578, 31 N. E. 706; *Clark v. Eltinge*, 38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556; *Iowa Loan & Trust Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22. See full notes on the general subject in *Lanfear v. Mestier*, 89 Am. Dec. 658; *State v. Twitty*, 11 Am. Dec. 779; *People v. McElroy*, 2 L. R. A. 609; *Rand v. Hanson*, 12 L. R. A. 574; *Cherry v. Sprague*, 67 L. R. A. 40; *Brown v. Wright*, 21 L. R. A. 467. See, also, *Hoshaw v. Lines*, 30 Okl. 67, 118 Pac. 583; *Cumberland Gas Light Co. v. West Virginia etc. Co.*, 182 Fed. 667. See the late cases: *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 Pac. 587; *Wilson v. Durkee* (Cal. App.), 129 Pac. 617; *American Woolen Co. v. Maaget* (Conn.), 85 Atl. 583; *Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796; *Crans v. Durdall* (Iowa), 134 N. Y. 1086; *Condit v. Johnson* (Iowa), 139 N. W. 477; *Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119; *Thompson v. St. Louis etc. R. Co.*, 243 Mo. 336, 148

S. W. 484; *Madden v. Missouri etc. R. Co.* (Mo. App.), 151 S. W. 489; *Dunbar v. Commercial etc. Co.*, 32 Okl. 634, 123 Pac. 417; *Casner v. Hoskins* (Or.), 128 Pac. 841; *Houston etc. R. Co. v. Fife* (Tex. Civ. App.), 147 S. W. 1181; *Washington Life Ins. Co. v. Lovejoy* (Tex. Civ. App.), 149 S. W. 398; *Southwest Surety Ins. Co. v. Anderson* (Tex. Civ. App.), 152 S. W. 816; *Stanford v. Gray* (Utah), 129 Pac. 423; *State Bank v. Pease* (Wis.), 139 N. W. 767.

⁵⁵ *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43, 25 South. 806; *Alabama etc. R. Co. v. Carroll*, 97 Ala. 126, 38 Am. St. Rep. 163, 18 L. R. A. 433, 11 South. 803; *Eureka Springs Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Norris v. Harris*, 15 Cal. 226; *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979; *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153, 51 S. E. 603; *Whitfield v. Louisville & N. R. Co.*, 7 Ga. App. 268, 66 S. E. 973; *Miller v. Macveagh*, 40 Ill. App. 532; *Scholten v. Barber*, 217 Ill. 148, 75 N. E.

forum.⁵⁶ "There is no doubt," says Justice Field, "that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies' were

460; *Edwards v. Schillinger*, 148 Ill. App. 227; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *Jackson v. Pittsburg etc. Co.*, 140 Ind. 241, 49 Am. St. Rep. 192, 39 N. E. 663; *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290; *St. Louis etc. R. Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156; *Chesapeake etc. R. Co. v. Hanmer*, 23 Ky. Law Rep. 1846, 66 S. W. 375; *Louisville & N. R. Co. v. Massie's Admr.*, 128 Ky. 449, 128 S. W. 330; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Tllexan v. Wilson*, 43 Me. 186; *National Bank v. Baltimore etc. R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159, 5 L. R. A. 200, 22 N. E. 49; *Ellis v. Maxson*, 19 Mich. 186, 2 Am. Rep. 81; *Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. 387; *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; *Hubbard v. Mobile etc. Ry. Co.*, 112 Mo. App. 459, 87 S. W. 52; *Atwater v. Edwards & Sons Brokerage Co.*, 147 Mo. App. 436, 126 S. W. 823; *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Terry v. Robbins*, 128 N. C. 140, 83 Am. St. Rep. 663, 38 S. E. 470; *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 240; *Cressey v. Tatom*, 9 Or. 541; *Rosemand v. Southern R. Co.*, 66 S. C. 91, 44 S. E. 574; *Tempel v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W.

222; *Frank v. Gump*, 104 Va. 306, 51 S. E. 358. But any modifications of the common law must be proved: *Newton v. Cocke*, 10 Ark. 169; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *White v. Knapp*, 47 Barb. (N. Y.) 549; *Vanderpool v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, 24 L. R. A. 548, 35 N. E. 932. See the late cases: *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 143 S. W. 1053; *Jones v. New York etc. R. Co.*, 211 Mass. 521, 98 N. E. 607; *Levy v. Downing (Mass.)*, 100 N. E. 638; *Bodine v. Berg (N. J.)*, 82 Atl. 901; *Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490; *In re Kutter's Estate*, 79 Misc. Rep. 74, 139 N. Y. Supp. 693; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722; *Pee Dee Naval Stores Co. v. Hamer (S. C.)*, 75 S. E. 695; *St. Louis etc. R. Co. v. Loughmiller*, 193 Fed. 639.

⁵⁶ *Louisville & N. R. Co. v. Cook*, 168 Ala. 592, 53 South. 190; *In re Hancock's Estate*, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; *Morril v. Bentley (Iowa)*, 126 N. W. 155; *Hinman v. Missouri, K. & T. R. Co.*, 83 Kan. 35, 110 Pac. 102; *Wagner v. Minnie Harvester Co.*, 25 Okl. 558, 106 Pac. 969; *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705; *Gilliland v. Southern R. Co.*, 85 S. C. 26, 137 Am. St. Rep. 861, 67 S. E. 20; *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

entitled."⁵⁷ In all the states thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists—it has been held in repeated instances—and it rests upon parties who assert a different rule to show that matter by proof.⁵⁸ It has been presumed in the absence of all proof that in another state the common law prevails as to champerty;⁵⁹ as to the *negotiability* of promissory notes;⁶⁰ as to the law of indorsement;⁶¹ as to the effect of giving a note on a pre-existing debt;⁶² as to the allowance of days of grace on negotiable paper;⁶³ as to *notice of dishonor* to fix liability of indorser;⁶⁴ as to the *validity of a marriage* solemnized by a priest and followed by cohabitation;⁶⁵ as to the invalidity of an *insurance policy* upon a life in which the insurer had no interest;⁶⁶ as to the invalidity of a *contract made without consideration*;⁶⁷ as to the rights of married women;⁶⁸ as to the passing of *title to personal property* to the personal representative;⁶⁹ as to the powers of administrators;⁷⁰ as to certain mat-

⁵⁷ 1 Kent's Commentaries, 343; Norris v. Harris, 15 Cal. 226.

⁵⁸ See Inge v. Murphy, 10 Ala. 885. As to the rules in those states established in territories and those in which a government existed at the time of accession—Florida, Louisiana and Texas—see exhaustive note to Knickerbocker Trust Co. v. Iselin (185 N. Y. 54, 77 N. E. 877), 113 Am. St. Rep. 863.

⁵⁹ White v. Knapp, 47 Barb. (N. Y.) 549; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Miles v. Collins, 1 Met. (Ky.) 311; Thurston v. Percival, 1 Pick. (Mass.) 415.

⁶⁰ Newton v. Cocke, 10 Ark. 169; Dunn v. Adams, 1 Ala. 527, 35 Am. Dec. 42; Ellis v. Maxson, 19 Mich. 186, 2 Am. Rep. 81; White v. Knapp, 47 Barb. (N. Y.) 549; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Forbes v. Scannell, 13 Cal. 242;

Bundy v. Hart, 46 Mo. 460, 2 Am. Rep. 525.

⁶¹ See Dubois v. Mason, 127 Mass. 37, 34 Am. Rep. 335.

⁶² Ely v. James, 123 Mass. 36.

⁶³ Ruse v. Mutual Benefit Life Ins. Co., 23 N. Y. 516; Walsh v. Dart, 12 Wis. 635; Lucas v. Ladew, 28 Mo. 342.

⁶⁴ Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

⁶⁵ Commonwealth v. Kenney, 120 Mass. 387; Raynham v. Canton, 3 Pick. (Mass.) 293; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

⁶⁶ Ruse v. Mutual Benefit Life Ins. Co., 23 N. Y. 516.

⁶⁷ Crouch v. Hall, 15 Ill. 263.

⁶⁸ State v. Clay, 100 Mo. 571, 13 S. W. 827.

⁶⁹ Reese v. Harris, 27 Ala. 301.

⁷⁰ Rogers v. Zook, 86 Ind. 237.

ters affected by the statute of frauds;⁷¹ as to *forfeiture of property for taxes*;⁷² as to the law regulating the *action of replevin*;⁷³ as to the *rights of property*;⁷⁴ as to the liability of common carriers.⁷⁵ As to *matters not covered by common law* the presumption is that there is no right or liability, unless the contrary is made to appear by proof of a statute or agreement.⁷⁶ The same rule applies as to certain actions for negligence.⁷⁷ Undoubtedly there are some limitations to be added to the general statement so often made, that the law of the sister state will be presumed to be the same as that of the forum.⁷⁸ For example, it has been repeatedly held that there will be no presumption, in a state where *penalties or forfeitures* are imposed for usury, that similar laws exist in another state.⁷⁹ But the contrary has been held as to the law of interest.⁸⁰ It will not be presumed that the law of another state requires *contracts for the sale of land* to be in writing, since at common law parol contracts of this character were valid.⁸¹ In an action in Massachusetts on a note made and delivered on *Sunday* in New York, there is no presumption of similarity of laws between the two states in the absence of proof, since such a note was valid at common law.⁸² In the absence of proof

⁷¹ Wilhite v. Skelton, 5 Ind. Ter. 621, 82 S. W. 932.

⁷² Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56.

⁷³ Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175.

⁷⁴ Connor v. Trawick, 37 Ala. 289, 79 Am. Dec. 58; Silver v. Kansas City Ry., 21 Mo. App. 5; Cressey v. Tatom, 9 Or. 541; Robards v. Marley, 80 Ind. 185.

⁷⁵ Eureka Springs Co. v. Timmons, 51 Ark. 459, 11 S. W. 690.

⁷⁶ Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Hudson v. Daily, 13 Ala. 722; Palfrey v. Portland Ry. Co., 4 Allen (Mass.), 55 (injury in Maine, no statute in state of Massachusetts creating the liability). See, also, Teat v. Chapman, 1 Ala. App. 491,

56 South. 267; Westberry v. Clanton, 136 Ga. 795, 72 S. E. 238.

⁷⁷ Whitford v. Panama Ry. Co., 23 N. Y. 465; Leonard v. Columbia Co., 84 N. Y. 48, 38 Am. Rep. 491; State v. Pittsburg Co., 45 Md. 41.

⁷⁸ As to this general subject, see annotated cases cited in note 45 to last section; also, note to Ormes v. Dauchy, 37 Am. Rep. 583.

⁷⁹ Gridler v. Driver, 46 Ark. 50; Cutler v. Wright, 22 N. Y. 472; Hull v. Augustine, 23 Wis. 383.

⁸⁰ Crafts v. Clark, 31 Iowa, 77, 38 Iowa, 237; Cooper v. Reaney, 4 Minn. 528; National Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Thomas v. Beckman, 1 B. Mon. (Ky.) 29.

⁸¹ Ellis v. Maxson, 19 Mich. 186, 2 Am. Rep. 81.

⁸² Murphy v. Collins, 121 Mass. 6; Hill v. Wilker, 41 Ga. 449, 5 Am.

of the law of Virginia, a contract made in New York to advertise in Virginia a *lottery* to be drawn in that state will not be held invalid in New York, although lotteries are illegal in New York.⁸³ Among the states that have held that in the absence of evidence the law of the sister state will be presumed to be the same as that of the forum, that is to say, the statute law as well as the common law, are Arkansas, California, Illinois, Iowa, Kansas, Louisiana, Nebraska, Nevada, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin.⁸⁴ The states that have held the contrary, that is to say, that in the absence of evidence there is no presumption that the statute law as well as the common law of a sister state is the same as that of the former, are Massachusetts, Minnesota, Missouri, New York, Oregon, and Utah.⁸⁵ In Massachusetts especially, Barker, J., in one

Rep. 540; Sayre v. Wheeler, 31 Iowa, 112. In Brimhall v. Van Campen, 8 Minn. 13, 82 Am. Dec. 118, it was held that as an action on a note executed on Sunday could not be sustained in that state, and in the absence of proof they would assume the laws of New York were the same as their own, the action must fail.

⁸³ Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583.

⁸⁴ Hall v. Pillow, 31 Ark. 32; Hickman v. Alpaugh, 21 Cal. 225; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Norris v. Harris, 15 Cal. 226; and a long line of cases up to Flood v. Dunphy, 147 Cal. 95, 81 Pac. 315 (see 2 Green's Cal. Dig. 2056); Justis v. Atchison, 12 Cal. App. 639, 108 Pac. 328; Lilly-Brackett Co. v. Sonneman, 157 Cal. 192, 106 Pac. 715; Juilliard v. May, 130 Ill. 87, 22 N. E. 477; Reid, Murdoch & Co. v. Northern Lumber Co., 146 Ill. App. 371; Neese v. Farmers' Ins. Co., 55 Iowa, 604, 8 N. W. 450; Goodnow v. Litchfield, 67 Iowa, 691, 25 N. W. 882; Campbell v. Campbell, 129 Iowa, 317, 105 N. W. 553; Moore v. Pooley, 17 Idaho, 57, 104 Pac. 898; First Nat. Bank of Galva v. Nord-

strom, 70 Kan. 485, 78 Pac. 804; Roe v. Roe, 52 Kan. 724, 39 Am. St. Rep. 367, 25 Pac. 808; Sandidge v. Hunt, 40 La. Ann. 766, 5 South. 55; Haggin v. Haggin, 35 Neb. 375, 53 N. W. 209; Fisher v. Donovan, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778; Rogers v. Hatch, 8 Nev. 35; Evans v. Cleary, 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440; Iowa L. & T. Co. v. Schnose, 19 S. D. 248, 9 Am. & Eng. Ann. Cas. 255, 103 N. W. 22; Southern Kansas R. Co. v. J. W. Burgess Co. (Tex. Civ. App.), 90 S. W. 189; White v. Richeson (Tex. Civ. App.), 94 S. W. 202; Missouri K. & T. R. Co. v. Harriman (Tex. Civ. App.), 128 S. W. 932; Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56.

⁸⁵ Wood v. Supreme Ruling of Fraternal Mystic World, 212 Ill. 532, 72 N. E. 783; Kelley v. Kelley, 161 Mass. 111, 42 Am. St. Rep. 389, 25 L. R. A. 806, 36 N. E. 837; Cherry v. Sprague, 187 Mass. 113, 105 Am. St.

case,⁸⁶ said that no proof as to the law of South Dakota having been offered, the judge was right in ruling that the common law of that state was to be presumed to be the same as that of Massachusetts, and that there was no presumption that the statutory law of the two states was the same.⁸⁷ In Minnesota, we find: "No presumption exists that the statutory law of a sister state is the same as that of this state."⁸⁸ In Illinois it will be observed there are apparently conflicting decisions. In one case⁸⁹ we find: "In the absence of any allegation or proof of a statute, we must presume either that the common law obtains in New York, or else that the laws of that state are similar to the laws which prevail in this state, where the action was tried"; and in another,⁹⁰ "The laws of the state of New Jersey governing the organization and specifying the powers of fraternal benefit insurance associations in that state were not introduced in evidence; and it will not be presumed, in the absence of proof, that the statute of said state contained any limitation as to the age of persons to whom insurance might be issued by fraternal benefit associations." We are inclined, however, not so to construe the difference, for the reason that while the former decision is emphatic in terms, the latter deals with an age limit, which was fixed by a by-law made under the powers of the certificate of organization, and does not de-

Rep. 381, 67 L. R. A. 33, 72 N. E. 456; *Cormo v. Boston Bridge Works*, 205 Mass. 366, 91 N. E. 313; *Wilcox v. Bergman*, 96 Minn. 219, 5 L. R. A., N. S., 938, 104 N. W. 955; *Eckles v. Missouri Pac. R. Co.*, 112 Mo. App. 240, 87 S. W. 99; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 78 N. E. 359; *Rogers v. McCoach*, 66 Misc. Rep. 85, 120 N. Y. Supp. 686; *Patton v. Patton*, 67 Misc. Rep. 404, 123 N. Y. Supp. 329; *Citizens' Sav. Bank v. Couse*, 68 Misc. Rep. 153, 124 N. Y. Supp. 79; *Rudy v. Rio Grande W. R. Co.*, 8 Utah, 165, 30 Pac. 366; *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705, in which the court said that as the decisions of the court of last resort

in Wisconsin were not offered in evidence, they were examined only so far as they interpreted the rules of common law existing in that state, independently of its statutes.

⁸⁶ *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456.

⁸⁷ *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389, 25 L. R. A. 806, 36 N. E. 837; *Olds v. City Trust etc. Co.*, 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022.

⁸⁸ *Wilcox v. Bergman*, 96 Minn. 219, 104 N. W. 955, 5 L. R. A., N. S., 938.

⁸⁹ *Juilliard v. May*, *supra*.

⁹⁰ *Wood v. Supreme Ruling of Fraternal Mystic World*, *supra*.

clare the abrogation of the rule laid down in the former. Later cases, however, have set at rest the idea that Illinois countenances any such conflict. The court in 1909 said⁹¹ that the record did not show either by pleadings or proof that the laws of the state of Michigan differed from those of Illinois, and hence it must be presumed that the same rules prevailed in one state as in the other. In Arkansas there appear to be two cases in direct conflict.⁹² So that by a great number of decisions the rule seems to be maintained that the law of a sister state, including the statutory law, in the absence of proof, should be presumed to be the same as that of the forum; but we have seen that some limitations as to this rule exist, and there is very high authority indeed for the view that while the presumption under discussion extends to *the common-law rules* it does not apply to the *statutory law* of another state. It has often been declared, and with much force, that it cannot be presumed that the legislature of another state has adopted all the statutes of the state of the forum, and that the court should have proof before it can assume that such statutes have been passed.⁹³ But whatever may be the presumptions to be indulged, the party who seeks to avail himself of the statute of another state should prove it; otherwise the court will apply the law of the jurisdiction.⁹⁴ The conclusion to

⁹¹ In *re Reid, Murdoch & Co. v. Northern Lumber Co.*, 146 Ill. App. 371, citing cases from *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682, to *Gunning System v. La Pointe*, 113 Ill. App. 405.

⁹² *Newton v. Cocke*, 10 Ark. 169; *Hall v. Pillow*, 31 Ark. 32. The latter case, however, being limited in its ruling. The court said that in the absence of proof they would presume the law of Mississippi gave to the acknowledgment and recording of mortgages, deeds of trust, etc., the same effect as was given by the law of Arkansas.

⁹³ *Newton v. Cocke*, 10 Ark. 169; *Krouse v. Krouse*, 48 Ind. App. 3, 95 N. E. 262; *Murphy v. Collins*, 121 Mass. 6; *Twin City Box Factory v.*

Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W. 497; *Ellis v. Maxon*, 19 Mich. 186, 2 Am. Rep. 81; *McCulloch v. Norwood*, 58 N. Y. 562; *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Carpenter v. Railway Co.*, 72 Me. 388, 39 Am. Rep. 340; *Bundy v. Hart*, 46 Mo. 460, 2 Am. Rep. 525; *Kelly v. Kelly*, 161 Mass. 111, 42 Am. St. Rep. 389, 25 L. R. A. 806, 36 N. E. 837; *Harris v. White*, 81 N. Y. 532; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583, and note with illustrations.

⁹⁴ *Monroe v. Douglass*, 5 N. Y. 447; *Savage v. O'Neil*, 44 N. Y. 298; *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982, and cases already cited.

be reached is, that the law of a sister state, as to the common law, is presumed to be the same as in the state of the forum; that in some states the statute law of a sister state—in the absence of evidence—is presumed to be the same as the statute law of the state of the forum; that in other states—in the absence of evidence—the statute law of a sister state is not presumed to be the same as the statute law of the forum; and finally, that when the evidence discloses that the statute law of another state is different from that of the forum, and such sister state law is not proved, the court cannot presume their similarity.⁹⁵ Therefore, it is, that the prudent practitioner must first discover whether the law of his state recognizes the presumption of similar legislation in other states to that of his own. If it does and the legislation is the same, it is needless to prove it. If it does not, or if the legislation is different, then the necessity for proving it in the mode prescribed by the local statute is unquestionable. And since even in those states which avow their readiness to presume the parallel legislation of other states there oftentimes exist qualifications of the rule, the course to be adopted, *ex abundante cautela*, is in every case to follow the easy means offered by the law to prove the laws of the sister state in question.

§ 84 (83). **Same subject—Foreign law.**—Some little and unnecessary confusion has been caused by the terminology which includes the laws of sister states under the generic heading of foreign law. In treating the subject here, a sharp distinction has been advisedly drawn for greater convenience both of treatment and reference. Whatever presumption we have shown in the preceding section exists as to the laws of sister states has no application in respect to foreign countries having a system of jurisprudence of their own, which has no connection with our own or the common law, or to states which before becoming members of the Union were not subject to the common law.⁹⁶ It will have

⁹⁵ *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360.

⁹⁶ As to proof of foreign laws, see §§ 502, 503, *post*, and note to *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 13 Am. St. Rep. 863, 868, 77 N. E. 877. See, also, the late cases, *Schweitzer v. Hamburg etc. Gesell-*

Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 13 Am. St. Rep. 863, 868, 77 N. E. 877. See, also, the late cases, *Schweitzer v. Hamburg etc. Gesell-*

been gathered that the common law is presumed to prevail in states judicially known to be of common-law origin;⁹⁷ but there is no presumption that it prevails in any state or country where English institutions have not been established.⁹⁸ It is not presumed to be in force in Russia,⁹⁹ nor in France,¹⁰⁰ nor in Turkey (European and Asiatic),¹ nor among the Cherokee Nation,² nor in Texas,³ nor in Louisiana,⁴ nor in Mexico.⁵ Nor is there a presumption in New York that by the law of New Granada a civil action lies for the negligent killing of another.⁶ But it has been said that "Although courts do not, without proof, take notice of foreign laws, yet they will assume that certain general principles, consonant to reason and natural justice and of universal applicability, are recognized by all civilized nations; as, for instance, the right of self-preservation, the privileges and exemptions of necessity, the common duties of humanity, of more or less perfect obligation, and those obligations, for the most part conventional, upon which is based the modern system of international law."⁷ Wharton

schaff, 149 App. Div. 900, 134 N. Y. Supp. 812; *Barrielle v. Bettman*, 199 Fed. 838.

⁹⁷ *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43, 25 South. 806.

⁹⁸ *Banco de Sonora v. Bankers' etc. Co.*, 124 Iowa, 576, 104 Am. St. Rep. 367, 100 N. W. 532.

⁹⁹ *Savage v. O'Neil*, 44 N. Y. 298.

¹⁰⁰ *In re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406.

¹ *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190; *Aslanian v. Dostumian*, 174 Mass. 328, 75 Am. St. Rep. 348, 47 L. R. A. 495, 54 N. E. 845.

² *Du Val v. Marshall*, 30 Ark. 230; *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543.

³ *Brown v. Wright*, 58 Ark. 20, 21 L. R. A. 467, 22 S. W. 1022.

⁴ *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711.

⁵ *Banco de Sonora v. Bankers' etc. Co.*, *supra*.

⁶ *Whitford v. Panama Ry. Co.*, 23

N. Y. 465. In *Murphy v. Murphy*, 145 Cal. 482, 78 Pac. 1053, the court presumed the law of England as to interest on judgments the same as that of California in the absence of proof to the contrary.

⁷ *State v. Morrill*, 68 Vt. 60, 54 Am. St. Rep. 870, 33 Atl. 1070. Thus, the right to immunity from personal restraint and personal violence is such a natural right and so generally recognized that he who sues for false imprisonment or assault and battery in another country need not, in the first instance, prove that the act complained of was unlawful where committed. It will be presumed to have been unlawful there, and to have imposed liability for damages; or, to speak more exactly, in the absence of such proof, the court will proceed according to the law of the forum: *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388, 39 Am. Rep. 340.

says that with regard to what may be called processual presumption, of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides.⁸ But it amounts to the same thing whether you say that, in the absence of proof, the court will presume the foreign law to be like the domestic law, or that the court will proceed according to the domestic law.⁹ It must always be remembered that the courts do not take judicial notice of foreign laws, no matter whether they be written or unwritten. They must be proved like any other fact.¹⁰ The general rule is that in order to obtain the benefit of the law of a foreign country, it must be pleaded and proved. And in the absence of proof to the contrary, the rights of the parties will be adjudicated by the law of the forum. Where the

⁸ Wharton on Conflict of Laws, § 782.

⁹ In *Langdon v. Young*, 33 Vt. 136, Redfield, C. J., says it is proper to assume that flagrant violations of the fundamental principles of moral obligations, such as theft and murder, are regarded as crimes by all Christian nations, and that unjustly to accuse abroad one of such deeds as there committed is actionable. In *Woodrow v. O'Connor*, 28 Vt. 776, the court assumed, in the absence of proof, that there was no difference between our law and the law of Canada in respect of the validity of arbitration notes. And in *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941, in an action upon a note the court said that although it appeared upon the face of the note that it was executed in British Columbia, no contention or claim predicated upon British Columbia laws had been made, and that therefore the court would consider the laws of the state only; it being presumed, in the absence of any pleading or evidence to the contrary, that foreign laws are the same; citing *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Daniel v. Gold Hill Mining Co.*,

28 Wash. 411, 68 Pac. 884. In *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626, the court held that the law of France with reference to the mode of taking property under the disposing power of an appointment, in the absence of proof to the contrary, would be presumed the same as that of the forum, and cited in support, *McClellan v. Kennedy*, 8 Md. 230; *Haney v. Marshall*, 9 Md. 194; *State v. Pittsburgh & C. R. R.*, 45 Md. 41.

¹⁰ *Malpica v. McKown*, 1 La. 248, 20 Am. Dec. 279; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *De Sobry v. De Laistre*, 2 Har. & J. 191, 3 Am. Dec. 555; *Nelson v. Bridgport*, 8 Beav. 527, 50 Eng. Reprint, 207; *Sussex Peerage Case*, 11 Clarke & F. 85, 8 Eng. Reprint, 1034; *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 Sup. Ct. Rep. 469; *Coghlan v. South Carolina etc. Co.*, 142 U. S. 101, 35 L. Ed. 951, 12 Sup. Ct. Rep. 150. Consequently the maritime law of a foreign country must be proved like any other fact: *The Matterhorn*, 128 Fed. 863, 63 C. C. A. 331.

rights of litigants are to be determined in this country, although those rights might be affected by proof of the law of a *foreign* country where the contract was made or the right accrued, in the absence of any such proof the law of the forum must furnish the rule of decision.¹¹ Acts which are criminal by the law of the forum and are *malum in se* will be presumed to be crimes in a foreign state or country.¹² Another qualification has been thus stated: Where a right is sought to be enforced in one state in relation to a subject matter existing in another state, and no foreign law is proved, and no common-law rule was ever prescribed and no contract exists, in such case the court will apply the law of the state in which it is sitting.¹³ Where a contract is made in one state or country to be performed in another, the presumption is that the parties contracted with reference to the laws of the latter.¹⁴ Where the foreign law seeks to enforce a penalty or work a forfeiture, no presumption will be indulged that

¹¹ *Forbes v. Scannell*, 13 Cal. 242; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340; *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.), 311; *Thompson v. Ketcham*, 8 Johns. 189, 5 Am. Dec. 332; *McBride v. The Farmers' Bank*, 26 N. Y. 450; *Savage v. O'Neil*, 44 N. Y. 298; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Mexican Cent. R. Co. v. Olmstead* (Tex. Civ. App.), 60 S. W. 267; *State v. Morrill*, 68 Vt. 60, 54 Am. St. Rep. 870, 33 Atl. 1070; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884; *Robinson v. Detroit etc. Nav. Co.*, 73 Fed. 883, 20 C. C. A. 86; *Mexican Cent. R. Co. v. Glover*, 107 Fed. 356, 46 C. C. A. 334; *Lloyd v. Ginbert*, L. R. 1 Q. B. 115. As to Mexican laws of succession, see *Lucia Mining Co. v. Evans*, 146 App. Div. 416, 131 N. Y. Supp. 280; as to the rights of

married women in Russia, see *Savage v. O'Neil*, 44 N. Y. 298.

¹² *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen (Mass.), 308. Robbery, larceny and an assault upon the person of another, which are criminal offenses by the common law and the laws of all civilized countries, must be presumed to be crimes against the laws of Louisiana. And the ordinary presumption applies to this case that every person intelligent enough to be the subject of punishment must be presumed to know the criminal laws of the government under the jurisdiction of which he is found.

¹³ *Crake v. Crake*, 18 Ind. 156, holding that in an action on a justice judgment rendered in another state it must be proved that the justice had jurisdiction of the subject matter since justices had no common-law civil jurisdiction.

¹⁴ *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583, and cases cited.

it is similar to the law of the forum.¹⁵ Where the law of a foreign state is once proved to have been in existence, its continued existence will be presumed, in the absence of proof showing its repeal or modification.¹⁶ Of course, the presumption of similarity of a foreign law with that of the forum may be rebutted by evidence showing a dissimilar law. But this presumption of similarity may also be rebutted by evidence, such as decisions of the foreign state, tending to show a dissimilar law, even though the evidence be deemed insufficient or inconclusive upon the subject. It must, however, be of sufficient probative force as not to amount to a "total lack of evidence."¹⁷

§ 85 (84). Contracts presumed to be legal.—Perhaps for the reason that an illegal contract will not be countenanced by the courts, the presumption is never to be indulged that parties in making their contracts intended to violate the law; and if there are two laws with reference to which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended, because they had their election to mold their contract according to either law, and as the law presumes in favor of a contract and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract.¹⁸ There is the further reason that no

¹⁵ *Grider v. Driver*, 46 Ark. 50; *Fred Miller B. Co. v. De France*, 90 Iowa, 395, 57 N. W. 759; *Samuel Westheimer & Sons v. Habinek*, 131 Iowa, 643, 109 N. W. 189; *People's etc. Assn. v. Backus*, 2 Neb. (Unof.) 463, 89 N. W. 315; *Harris v. White*, 81 N. Y. 532; *Leake v. Bergen*, 27 N. J. Eq. 360; *Allen West etc. Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314; *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055.

¹⁶ *Bush v. Garner*, 73 Ala. 162; *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *St. Louis etc. Ry. Co. v. Eggmann*, 161 Ill. 155, 43 N. E. 620; *Cochran v. Ward*, 5 Ind. App.

89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; *In re Huss*, 126 N. Y. 537, 12 L. R. A. 620, 27 N. E. 784; *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699. Nor will the repeal of a statute of another state which is similar to the one previously in force in the state of the forum be presumed because of the repeal of the statute of the forum: *Ex parte Lafonta*, 2 Rob. (La.) 495.

¹⁷ *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360.

¹⁸ *Brown v. Freeland*, 34 Miss. 181; *Garrigue v. Kellar*, 164 Ind. 676, 108 Am. St. Rep. 324, 69 L. R. A. 870, 74 N. E. 523. As to the pre-

contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law, and which it was competent for the parties to adopt.¹⁹ The presumption always is that contracts are legal, not illegal, and the burden is on him who sets up illegality as a defense, on a suit to enforce a contract, to show how and why it is unlawful—whether it is in terms or by necessary implication violative of a declared public policy of the law, or of a positive statutory requirement, or the established facts may show that such results follow its enforcement.²⁰ As was said by Mr. Justice Holmes,²¹ “A contract is not assumed to contemplate unlawful results, unless a fair construction requires it upon established facts.” If an agreement does not provide the method whereby it shall become accomplished, if it can be accomplished in any legal method, it must be assumed that that method was in the contemplation of the parties when the contract was made, and will be pursued;²² because all contracts are presumed to intend good faith on the part of the contractors,²³ and the law will not presume an agree-

sumption of innocence, see § 12 et seq., *ante*, and extended note to *Levison v. Boas*, 12 L. R. A., N. S., 575.

¹⁹ *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Story*, Conf. of Laws, § 305a; *Wharton*, Conf. of Laws, 3d ed., § 429; *Garrigue v. Kellar*, *supra*.

²⁰ *Harbison-Walker Refractories Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988.

²¹ *Cincinnati etc. Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. Rep. 208.

²² *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438. In *Brown v. Bishop*, 105 Me. 272, 74 Atl. 724, we find: “Although the instrument in which the contract of the parties is expressed does not contain in all its parts the technical words customarily used in conveyances of real estate, yet we are of opinion that it is sufficient to effectuate the original honest intention

of the parties, without infringing any established rule of law applicable in this state to the transfer of an interest in real estate between the original parties.” In *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 680, dealing with a contract alleged to be in restraint of trade, the court said: “In these cases it is held that the court will presume that the parties intended to make a valid contract, and that they designed to provide a restraint which will be reasonable. This, of course, is subject to the universal rule that the parties cannot make the law, but must follow it, and when, upon a given state of facts, a rule of law operates, it is inexorable, and the intention of the parties to the contrary must be overriden.”

²³ *J. M. Ackley & Co. v. Hunter, Benn & Co.'s Co.*, 166 Ala. 295, 51 South. 964.

ment void as illegal or against public policy when it is capable of a construction which would make it consistent with the law and valid. Nor will the law presume a contract to be unconscionable. Where an attorney's charge in a contract for his services was seven hundred dollars to apply for an injunction, the court refused to say that the charge *per se* was unconscionable so as to avoid the contract.²⁴ The court in the case referred to said that an unconscionable bargain was a fraud, and it may be made to appear by showing that it is "such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other."²⁵ The presumption of legality is stronger than that of the identity of laws.²⁶ But the qualification is sometimes added, that where a contract is declared void by the law of the state or country where it was made, it cannot be enforced as a valid contract in any other, though by its terms it was to have been performed there.²⁷

²⁴ Ball v. Reyburn, 136 Mo. App. 546, 118 S. W. 524.

²⁵ Chesterfield v. Janssen, 2 Ves. Sr. 125, 155, 28 Eng. Reprint, 82. This definition as cited in Ball v. Reyburn, *supra*, was approved and followed in Wenninger v. Mitchell, 139 Mo. App. 420, 122 S. W. 1130, in which a marriage brokerage contract, was sought to be enforced.

²⁶ Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; Curtis v. Gokey, 68 N. Y. 300.

²⁷ Hyde v. Goodnow, 3 Comst. (N. Y.) 266. For the converse of this proposition, namely, that when a contract is valid in the place where made but contrary to the public policy or positive enactment of the place where it is sought to be enforced, it will not be enforced, see International Harvester Co. v. McAdam, 142 Wis. 114, 26 L. R. A., N. S., 774, 124 N. W. 1042; Hamilton v. Chicago, B. & Q. R. Co., 145 Iowa, 431, 124 N. W. 363; Carstens Packing Co. v. Southern Pac. Co., 58 Wash. 239, 108 Pac.

613. In International Harvester Co. v. McAdam, *supra*, the opinion of Marshall, J., is entitled to reproduction as resolving the question of such contracts into its simplest parts, at the same time illustrating it with the effect of the various presumptions upon it. We reproduce it in the syllabus prepared by the learned judge: 1. As to mere personal contracts, their validity and interpretation is referable to the *lex loci contractus*, unless the parties intended they should be governed by the *lex loci solutionis* or that of some other place, the real place of the contract being a matter of mutual intention, except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law. 2. What the intent was, mentioned in No. 1, as to the place of the contract in any case, is generally determinable by presumption of fact that the place of the contract was intended to be that where it was actually made, unless the place of performance was

§ 86 (85). Presumptions as to marriage—*De facto marriages*.—No branch of the subject under discussion is of so varied and interesting a character as that of the numerous presumptions applied to and arising out of the marriage relation. Bishop's definition of the doctrine, admirably compiled and often quoted, cannot be improved upon. He says:²⁸ "This presumption, expressed in the maxim, *Semper praesumitur pro matrimonio*, is spoken of in an early chapter. Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality, —not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void.

elsewhere, then the presumption is that the latter was intended, but such presumptions are rebuttable. In this the term "place of the contract" means the place mutually intended for reference as to validity and interpretation. 3. The law as to manner of performance is referable to the place of performance, while remedies for nonperformance are referable to the law of the forum where performance is sought to be enforced. 4. A contract valid by the law of the place thereof is valid everywhere. 5. The affording of remedies in one country for enforcing a contract which would not be valid if made in such country, but is valid by the law of the place where it was made, depends upon judicial comity of nations. 6. The comity mentioned is uniformly extended, unless such contracts as the one sought to be enforced are contrary to the public policy of the country of the forum, as declared by its courts or its law-making power on grounds of good morals, or the state or its citizens would be injured. 7. The scope of the comity spoken of,

within reasonable limitations, is determinable, as a matter of judicial policy, by each state for itself. 8. The rule that the law of a place of a contract governs, as to its validity and interpretation, applies to the capacity, including that of married women, to contract. 9. The rule that a contract, valid by the law of the place thereof, is valid everywhere, is without exception, notwithstanding in some cases a foreign contract is not enforceable. 10. A foreign contract of a class which if it were made in the country of the forum would be contrary to the law thereof is not necessarily unenforceable in such forum because such a contract is contrary to public policy. To be so, the contract must be, by moral standards in the judgment of the court, pernicious and injurious to the public welfare.

²⁸ Bishop on Marriage, Divorce and Separation, § 956, cited by Pemberton, C. J., in *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312, as 1 Bish. Marriage and Divorce, § 457.

So that this issue cannot be tried like the ordinary ones, which are independent of this special presumption. And the strength of the presumption increases with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce." What facts will justify a court or jury in inferring as a matter of fact that a valid marriage contract has actually been made between two persons is a question that appears to be involved in considerable obscurity and uncertainty, owing to the diversified circumstances under which that question has been presented in different cases, and also to the different phases of litigation in which it has been before the courts. But it is a familiar application of the general presumption in favor of the regularity of official and other lawful acts that, when a marriage ceremony is shown to have been performed *de facto*, it is presumed to have been *properly and legally performed*.²⁹ When it was established as a fact that the celebration of a marriage had taken place publicly before assembled witnesses, and by a regular minister, and that the courthouse of the county had been subsequently destroyed by fire, the presumption of the law would obtain that the proper preliminaries, as obtaining a license, had been complied with, and that it was a valid marriage, and the bur-

²⁹ *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, Full Reprint, 1118, 1136; *Sichel v. Lambert*, 15 Com. B., N. S., 781; *Harrod v. Harrod*, 1 Kay & J. 4, 69 Eng. Reprint, 344; *Rex v. Mainwaring*, 26 L. J. M. C. 10; *Rex v. Craddock*, 3 Fost. & F. 837. For full notes on the subject of this section see *Appeal of Reading Fire Ins. etc. Co.*, 57 Am. Rep. 451; *Pittinger v. Pittinger*, 89 Am. St. Rep.

198; *Megginson v. Megginson*, 14 L. R. A. 540. A divorce will be presumed in order to sustain second marriage: *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, and note, 53 Pac. 312. As to proof of marriage in criminal cases, see full note, 36 Am. Dec. 745. As to legitimacy, see § 93 et seq., *post*. See, also, § 14, *ante*.

den of proving to the contrary was on those attacking it.³⁰ The presumption is not a light one to be easily rebutted. Lord Campbell, in a now historic case,³¹ said: "My opinion is, that a presumption of this sort, in favor of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show that this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid, the woman, the wife of the person to whom she was married, and the children legitimate. My lords, to avoid such a peril, the law requires that you should negative every reasonable possibility." In this country, the consent of parents, when essential to the validity of a marriage, is presumed from the mere record of the marriage.³² So the publication of banns and the procuring of a license will be presumed from the proof of the solemnization of the marriage.³³ When a marriage ceremony is shown, it will be presumed that the parties had legal capacity to marry; that the formalities of the law of the place were complied with, and that the marriage was a valid one.³⁴ When a marriage has been shown

³⁰ Clayton v. Haywood (Tex. Civ. App.), 133 S. W. 1082.

³¹ Piers v. Piers, *supra*.

³² Milford v. Worcester, 7 Mass. 48. But the English authorities do not go so far: Rex v. James, Russ. & R. C. C. 17; Rex v. Butler, Russ. & R. C. C. 1; Rex v. Morton, Russ. & R. C. C. 19.

³³ Davis v. Davis, 7 Daly (N. Y.), 308; Murphy v. State, 50 Ga. 150; Lloyd v. Passingham, G. Coop. 152, 35 Eng. Reprint, 512.

³⁴ Sichel v. Lambert, 15 Com. B., N. S., 781, 109 Eng. Com. L. 781; Catherwood v. Calson, 1 Car. & M. 431, 41 Eng. Com. L. 237; United States v. De Amador, 6 N. M. 173, 27 Pac. 488; United States v. De Lujan, 6 N. M. 179, 27 Pac. 489; United States v. Chaves, 6 N. M. 180, 27 Pac. 489; Megginson v. Megginson, 21 Or. 387, 14 L. R. A. 540, and full note, 28 Pac. 388; Sullivan v. Grand Lodge K. P., 97 Miss. 218, 52 South. 360. In Wilkie v. Collins, 48

in evidence, whether regular or irregular, the law raises a strong presumption of its legality. The evidence to repel that presumption must be strong, distinct, and satisfactory.³⁵

§ 86a (85). Same—Cohabitation and reputation.—The presumption is not limited to those cases in which a marriage ceremony has been performed, but some important element in the necessary legal formalities is absent or impossible of proof. When persons live and cohabit together as husband and wife, and are generally reputed to be husband and wife, there is a presumption that they have been married.³⁶ The courts look upon this presumption with great favor, and it has been frequently held that a subsequent marriage might be presumed from these facts although the parties originally came together under a void contract.³⁷ Independent of direct evidence, one of the

Miss. 511, the court said: "If no other fact appeared, but simply the marriage, the presumption is in favor of validity. But there is also a presumption in favor of the continuance of life, which is only overcome by a protracted absence for the time specified. In such circumstances, founded on considerations of policy, and in favor of innocence, the presumption in favor of the marriage will prevail, as against that of the continuance of life; and it will devolve upon the disputant of the marriage to overcome it by testimony that the first husband was living at the time of the second marriage." Where the validity of the marriage of one who had been divorced and again married in another state within the time prohibited by the laws of the state in which the divorce was granted depends upon the domicile, all doubts should be resolved in favor of the validity of the marriage and the legitimacy of the issue: *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45.

³⁵ *In re Lando's Estate*, 112 Minn. 257, 30 L. R. A., N. S., 940, 127 N. W. 1125.

³⁶ *Cargile v. Wood*, 63 Mo. 501; *Redgrave v. Redgrave*, 38 Md. 93; *Smith v. Fuller* (Iowa), 108 N. W. 765; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Morris v. Davis*, 5 Clark & F. 163, 7 Eng. Reprint, 365; *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, 1118, 1136; *Young v. Foster*, 14 N. H. 114; *Fleming v. Fleming*, 8 Blackf. (Ind.) 234; *Stover v. Boswell*, 3 Dana (Ky.), 232; *Megginson v. Megginson*, 21 Or. 387, 14 L. R. A. 540, 28 Pac. 388; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293; *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89. See full note to Appeal of Reading etc. Trust Co., 57 Am. Rep. 451; and see, also, note to *Taylor v. Sweet*, 22 Am. Dec. 156.

³⁷ *Betsinger v. Chapman*, 88 N. Y. 487, and cases cited; *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293; *Land v. Land*, 206 Ill. 288, 99 Am. St. Rep. 171, 68 N. E. 1109.

methods most resorted to for proving the contract of marriage in civil actions is, by the facts that the parties have cohabited together as husband and wife, and that such cohabitation has been attended with the reputation in the community in which the parties have resided and made their home that they are married.³⁸ This applies to civil actions by the parties against each other, as well as those brought by such parties against third persons. The reasons why the law allows the contract of marriage to be presumed upon proof of the cohabitation of the parties are thus cogently stated by McKinney, J., speaking for the supreme court of Tennessee: "For nearly a quarter of a century before the filing of this bill, the parties had cohabited as husband and wife, believing all that time that they had been lawfully married, as did all others with whom they had intercourse. And the question, whether, after so great a lapse of time, such a marriage can be declared void from the beginning is one in which not only the parties, but the public also, have a deep interest, in view of the consequences, as affecting the status of children born of the marriage; the relations of affinity and consanguinity which may have sprung from it; the rights of property, which may have been acquired on the faith of it; and all the consequential rights, obligations, and duties growing out of it. Upon established principles and analogies of the law, we think it may be held, that, under the circumstances of this case, a lawful marriage, for all civil purposes, will be conclusively presumed; and that neither the parties themselves, nor third persons, perhaps, will be heard to disprove or deny the marriage."³⁹ It is a familiar doctrine, that in all cases, except prosecutions for bigamy, and actions for criminal conversation, a marriage may be presumed, or be established by reputation, after the lapse of many years.⁴⁰ And the principle is equally fam-

³⁸ *Johnson v. Johnson*, 1 Coldw. (Tenn.) 626; *Clayton v. Wardell*, 4 N. Y. 230; *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377; *Alloway v. Babineau*, 8 La. Ann. 469; *Cole v. Langley*, 14 La. Ann. 770; *Jones v. Reddick*, 79 N. C. 290; *Chamberlain v.*

Chamberlain, 71 N. Y. 423; *Miller v. White*, 80 Ill. 580; *Port v. Port*, 70 Ill. 484.

³⁹ *Johnson v. Johnson*, *supra*.

⁴⁰ *Ewell v. State*, 6 Yerg. (Tenn.) 364, 27 Am. Dec. 480; *Rogers v. Lessees of Park*, 4 Humph. (Tenn.) 480.

iliar, that where persons have represented themselves to be married, or have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such, though not in fact married, they will, when it is sought to charge them with any of the civil liabilities growing out of that relation, be conclusively presumed to sustain such relation to each other; and will not be permitted to disprove or deny the marriage.⁴¹ It is laid down by Starkie, that in an action against husband and wife, it is sufficient to prove the marriage *de facto*, by evidence of cohabitation, acknowledgment, or reputation; and they cannot prove, in defense, that they were not legally married . . . it would not be going too far, perhaps, to hold that after the lapse of more than twenty years, the presumption of a subsequent legal marriage ought to be regarded as a conclusive presumption, not subject to be disproved." Cohabitation, however, to be such as the law requires, from which the fact of marriage will be presumed, must be a constancy of dwelling together.⁴² Where a deed signed by a married woman, to which her husband was a necessary party, did not bear his signature, it was sought to uphold the deed on the ground that there was no evidence to show that her husband was living when the deed was executed or indeed that they were ever married. The suggestion was scouted by the court. "The marriage is sufficiently proven by reputation. They lived together as husband and wife, and she, in the deed, assumes his name. The presumption is that the relation of marriage, once established, continues until it has been shown that it was dissolved."⁴³ Bishop gives the following instances in which such proof has been deemed sufficient to raise the presumption of marriage: "Cohabitation and repute are adequate in questions of legitimacy."⁴⁴ So even it was held where one sought to recover as heir of a deceased brother, during the life of the father, who was not called as a witness.⁴⁵ And this evidence will suffice in a woman's action

⁴¹ Greenl. on Ev., §§ 27, 207.

⁴⁴ 1 Bish. Mar., Div. & Sep., § 943.

⁴² Johnson v. Johnson, *supra*.

⁴⁵ Fleming v. Fleming, 4 Bing.

⁴³ Kentucky Stave Co. v. Page 266.
(Ky.), 125 S. W. 170; 1 Greenl. on
Ev., § 41.

to have dower;⁴⁶ or to inherit property as widow of the deceased;⁴⁷ in favor of husband and wife who jointly, as such, bring detinue,⁴⁸ or ejectment or any other ordinary civil action;⁴⁹ in a husband's suit for the slander of asserting that he is living in concubinage with the woman whom he claims to be his wife;⁵⁰ in an action against husband and wife for breach of the wife's promise, made before marriage, to marry the plaintiff;⁵¹ or to charge land held in the name of the wife, as the property of the husband,⁵² and also in settlement cases."⁵³ In a recent divorce case in Nebraska, the wife relied on an alleged common-law marriage with the respondent, and the marriage was upheld and the divorce granted on evidence which disclosed cohabitation and a mere scintilla of proof as to the contract.⁵⁴ The presumption has found its way into the statutory lists of presumptions in most of the code states—that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.⁵⁵ In a proceeding involving the

⁴⁶ *Young v. Foster*, 14 N. H. 114; *Smith v. Fuller* (Iowa), 108 N. W. 756; *Sellman v. Bowen*, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; *Stevens v. Reed*, 37 N. H. 49; *Pearson v. Howey*, 6 Halst. (11 N. J. L.) 12. See *Hilton v. Snyder*, 37 Utah, 384, 108 Pac. 698.

⁴⁷ *Stover v. Boswell*, 3 Dana (Ky.), 232; *Kuhl v. Knauer*, 7 B. Mon. (Ky.) 130.

⁴⁸ *Crozier v. Gano*, 1 Bibb (Ky.), 257.

⁴⁹ *Hamrick v. Bronson*, 5 Day (Conn.), 290; *Boatman v. Curry*, 25 Mo. 433.

⁵⁰ *Hobdy v. Jones*, 2 La. Ann. 944.

⁵¹ *Pettingill v. McGregor*, 12 N. H. 179.

⁵² *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377.

⁵³ *Rex v. Stockland*, 1 W. Black. 367.

⁵⁴ *Coad v. Coad*, 87 Neb. 290, 127 N. W. 455. A very strong dissenting opinion is filed in this case, which

nevertheless contains a valuable résumé of the law. In dealing with the presumptions arising, the court said that while the mere fact of the indulgence in the sexual intercourse and relation is not of itself conclusive proof of marriage, yet it is always a proper subject for consideration after evidence of the agreement to enter into the matrimonial relation. Again, where such presumption may arise, the law will always presume that the acts of persons are lawful, and that the commission of crime was not intended. If, under the circumstances shown, a person may have acted from motives of morality and purity, the presumption in favor of such motives will prevail, as the presumption is that people do not intentionally do wrong.

⁵⁵ Cal. Code Civ. Proc., § 1963 (30). A prosecution under section 266g of the Penal Code is for placing the wife of defendant in a house of prostitution, and a lawful marriage is essential to the offense. If

establishment of relationship with a testator, testimony that a man and a woman, having the same surname, lived together as husband and wife, that they always called a child who lived with them their child and their daughter, and that she called them father and mother, is sufficient *prima facie* evidence of their marriage and of her legitimacy.⁵⁶

§ 87 (86). Cohabitation and reputation to concur—Weight of presumption.—In speaking of the presumption raised by cohabitation and repute, the conjunction of the terms has become a matter of technical use, and both cohabitation and repute should concur in order to raise the presumption of marriage; mere cohabitation is not sufficient,⁵⁷ nor is mere repute.⁵⁸ This repute must be of a general and not of a special character.⁵⁹ It is not sufficient that

the woman placed therein by defendant was not his wife, though a ceremony of marriage passed between them, because of a prior existing marriage of the defendant with another person, proved without conflict to exist when the last ceremony was performed, a verdict of guilty of the offense charged is against the evidence. Where the fact of the ceremony of the prior marriage, though not its form, was proved, and the parties thereafter lived together as husband and wife, and a child was born to them, and the defendant continued to support her and treat her as his lawful wife, this was *prima facie* evidence of a marriage, and the parties are presumed to have entered into a lawful contract of marriage: *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039.

⁵⁶ *Estate of Hartman*, 157 Cal. 206, 107 Pac. 105. In such a proceeding, evidence that two men, having the same surname, called each other brother, that each spoke to the other by his first name, and that their conversation and conduct indicated re-

lationship and was consistent with the fact that they were brothers, suffices to establish the fact of such relationship. The presumptions of legitimacy and from the identity of name supply the fact that they were legitimate children of the same father.

⁵⁷ *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198; *Cargile v. Wood*, 63 Mo. 501; *Foster v. Hawley*, 8 Hun (N. Y.), 68; *Hemingway v. Miller*, 87 Minn. 123, 91 N. W. 428; *Williams v. Herrick*, 21 R. I. 401, 79 Am. St. Rep. 809, and note, 43 Atl. 1036; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

⁵⁸ *Greenawalt v. McEnelley*, 85 Pa. 352; *Blair v. Howell*, 68 Iowa, 619, 28 N. W. 199. But see 1 Bish. Mar. & Div., § 936; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733.

⁵⁹ *Cunninghams v. Cunninghams*, 2 Dow. 482, 3 Eng. Reprint, 939; *Barnum v. Barnum*, 42 Md. 251; *Jones v. Hunter*, 2 La. Ann. 254.

the parties were in the habit of living together at irregular intervals, or of visiting each other for short periods of time. The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together; to have the same habitation; so that where one lives and dwells, there does the other live and dwell always with him.⁶⁰ The proof of cohabitation alone, however, as we have said, is not of itself sufficient to establish the presumption of marriage, but such proof must be accompanied with proof of the fact that such cohabitation has been attended with the reputation in the community in which the parties reside and have their home, that they are husband and wife, and that they are generally recognized and received as such by their neighbors and acquaintances. By "reputation," as here used, is understood the speech of the people who have an opportunity to know the parties.⁶¹ The law always presumes in favor of legitimacy, and where the proof shows the existence of a continued cohabitation of the parties for several years, as man and wife, the presumption is always indulged that the cohabitation is legal rather than otherwise. For if parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that *status*, the law will, in favor of morality and decency, presume that they have been legally married.⁶² Marriage may, doubtless, be proved in civil cases, other than actions for seduction, by reputation, declarations and conduct of the parties; but where reputation is relied on, that reputation, to raise the presumption of marriage, must be founded on general, not divided or singular, opinion; and where reputation in such case is divided, it amounts to no evidence at all. And so with respect to the declarations of the parties; the value of such declarations as evidence will always depend upon the circumstances under which they were made.⁶³ Instances of

⁶⁰ Yardley's Estate, 75 Pa. 207.

97; *Cunninghams v. Cunninghams*, 2

⁶¹ *Commonwealth v. Stump*, *supra*;
Cargile v. Wood, *supra*.

Dow, 482, 3 Eng. Reprint, 939.

⁶³ *Barnum v. Barnum*, 42 Md. 251.

⁶² *Redgrave v. Redgrave*, 38 Md.

Such is the rule laid down by both

the rebuttal of the presumption may be found in the reported cases. For instance, where a slave marriage was never affirmed after emancipation, but, before emancipation, the slave husband went to California from Missouri in 1859, and the slave wife moved to Texas, and the former slave husband, after emancipation, contracted a valid marriage in California, while his former "wife" was living, the slave marriage was disaffirmed. "If it be insisted," said the court in that case,⁶⁴ "that a presumption of marriage arose from cohabitation and repute, this presumption is removed by proof of . . . formal and lawful marriage in this state."⁶⁵ The presumption has also been rebutted in a case of rape upon a girl under fifteen, where the defendant alleged a common-law marriage with her. Her testimony that the accused was not her husband, and that he had only

Lord Eldon and Lord Redesdale in *Cunninghams v. Cunninghams*, *supra*. The parties must be reputed and holden to be married. It must not be an opinion of A, in contradiction to an opinion of B, and of C in opposition to D; it must be founded, not on singular, but on general, opinion. That species of repute which consisted in A, B, and C thinking one way, D, E, and F another way, was no evidence on such a subject. The testimony of a single witness is consequently held insufficient to establish the fact that the parties, the marriage of whom it is sought to prove, had the reputation of being husband and wife, even though such witness is one of the parties: *Commonwealth v. Stump*, *supra*; *Jones v. Hunter*, 2 La. Ann. 254. Nor can such reputation be proved by the testimony of those living in a neighborhood, where the parties have lived but for a short period: *Jones v. Hunter*, *supra*. So where the cohabitation was meretricious in the beginning, the law presumes it to have so continued, and no presumption that the same was legal is entertained: *Cunninghams v.*

Cunninghams, *supra*; *Cram v. Burnham*, 5 Greenl. (Me.) 213, 17 Am. Dec. 218; *Estate of Beverson*, 47 Cal. 621; *Clayton v. Wardell*, 4 N. Y. (4 Comst.) 230; *Caujolle v. Ferrie*, 23 N. Y. 90; *Barnum v. Barnum*, *supra*; *Rose v. Clark*, 8 Paige Ch. (N. Y.) 574; *Jones v. Jones*, 45 Md. 144. So where one of the parties, after cohabiting with the other for a length of time, marries a third person, the presumption arising from such cohabitation is thereby destroyed, and an actual marriage must be proved: *Breakey v. Breakey*, 2 U. C. Q. B. 349, 358; *Taylor v. Taylor*, 1 Lea, 571; S. C., 5 Eng. Ec. R. 454; *Jones v. Jones*, *supra*; *Lapsley v. Grierson*, 1 H. L. Cas. 498, 506, 9 Eng. Reprint, 853.

⁶⁴ *In re Campbell's Estate*, 12 Cal. App. 707, 108 Pac. 669, 676.

⁶⁵ *Case v. Case*, 17 Cal. 598. It was held in *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466, that the presumption of a marriage between A and B, founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A and C during the lifetime of B.

agreed to marry her at a future unfixed date, was sufficient to dispel any presumption aroused by their cohabitation.⁶⁶ But while the reputation of marriage together with cohabitation has been held a sufficient foundation for the marriage, so the reputation of the parties as unmarried, unsupported by other circumstances, is not sufficient to disprove that a ceremonial marriage did occur. A Connecticut case⁶⁷ is authority for the ruling that, where a formal marriage is proved, evidence simply that the parties were reputed in the locality to be unmarried is insufficient as a matter of law to disprove the marriage. The opinion there says: "But it may be asked, has reputation no office as tending to disprove marriage? Not where an actual, ceremonial marriage is relied upon as in this case. But, where marriage is attempted to be established by reputation, we think the defendant might be allowed to weaken the evidence by showing that the reputation was not general but was divided, but even in such case the authorities restrain the negative evidence within narrow limits." The remarks of the court sufficiently make the distinction and point clear that, where the only evidence relied on to prove marriage is evidence of cohabitation and repute, then reputation inconsistent with the matrimonial character of the parties is sufficient to make an issue of fact.⁶⁸ A Michigan case, speaking of a marriage sought to be established by reputation,⁶⁹ says: "Reputation is important as evidence to establish the fact of a marriage, but it cannot disprove an actual marriage." If the rule were otherwise, it would allow a mere presumption to have equal weight and force with a positive fact. A ceremonial marriage being shown,

⁶⁶ *Wofford v. State*, 60 Tex. Cr. 624, 132 S. W. 929. "It is contended by appellant that under the law the evidence showing cohabitation between a man and a woman, following their agreement or engagement to marry at some future time, raises a presumption of their consent to become husband and wife, and the courts have held in some civil cases in this state that such a presumption

is so raised, in the absence of any rebutting testimony. We think that any such presumption in this case was conclusively rebutted by the testimony of the very witness by whom the cohabitation was proven."

⁶⁷ *Northrup v. Knowles*, 52 Conn. 522, 52 Am. Rep. 613.

⁶⁸ See 8 Ency. of Ev., p. 481.

⁶⁹ *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220.

“the presumption,” it is said, “in favor of marriage and legitimacy of children is one of the strongest known to the law.” It is otherwise when the only proof relied on to establish marriage is cohabitation and repute.⁷⁰

§ 88 (87). **Presumption of marriage in civil issues.**—It frequently happens that some case, called for convenience of identification a leading case, acquires a spurious notoriety, attributable, not to its conservative use, but to a misconception of its application; and the consequence is, that the longer the errors are perpetuated the worse becomes the effect of the initial error as courts endeavor to whittle away the mischievous parts, often leaving the remainder out of respect to its origin. Just such a case has been constantly adopted as the *fons et origo* from which is to come the law regulating the presumption of marriage in certain cases. In that case⁷¹ it was held that, in an action for criminal conversation, proof of cohabitation and repute alone could not raise a presumption of marriage. Bishop has gone to a proper length in analyzing it,⁷² and has shown that “by force of statutes in some of our states, and judicial decisions in others, it is believed that most of the mistakes growing out of misunderstandings of it have been corrected.”⁷³ In a New Hampshire case, the court accepted

⁷⁰ Clayton v. Haywood (Tex. Civ. App.), 133 S. W. 1082, 19 Am. & Eng. Ency. of Law, 1206, 8 Ency. of Ev. 464.

⁷¹ Morris v. Miller, 4 Burr. 2057, 98 Eng. Reprint, 73, 1 W. Black. 632, 96 Eng. Reprint, 366. This case has been constantly cited as authority. See Mr. Bishop's comments on its history, 1 Bish. Marr. & Div., §§ 1036 and 1042. For full note on the general subject, see Appeal of Reading Fire Ins. etc. Co., 57 Am. Rep. 451.

⁷² 1 Bish. Marr. Div. & Sep., §§ 1036, 1042.

⁷³ Id., § 1044. To guide the reader, a short account of Morris v. Miller is appended. It was an action

for criminal conversation. The plaintiff “proved articles between the man and his wife, made after marriage, for the settling of the wife's estate, with the privacy of relations on both sides. We proved cohabitation, name, and reception of her by everybody as his wife; though we did not indeed prove it by any register, or by witnesses who were present at the marriage. ‘In ejectment five months ago, before Lord Mansfield, this sort of evidence was offered and received.’ Lord Mansfield said: ‘It certainly may be done so in all cases, except two: one is in prosecutions for bigamy; and this case is the other.’ The defendant confessed to his landlord ‘that she was Captain Morris’ wife, and

the doctrine, but with dissatisfaction. Parker, C. J., said: "Were not the authorities so strong it might well be questioned whether this evidence of cohabitation and reputation ought not to be admitted in cases of *crim. con.*, and in prosecutions for adultery and bigamy, for the simple reason that it has a legitimate tendency to prove the fact. If larceny, and robbery, and murder, may be proved by circumstantial evidence, the inquiry naturally arises why cases of

that he had committed adultery with her.' Lord Mansfield: 'We are all clearly of opinion, that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation, are not sufficient to maintain this action. But we do not at present define what may or may not be evidence of a marriage in fact. This is a sort of criminal action; there is no other way of punishing this crime, at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself. In prosecutions for bigamy, a marriage in fact must be proved. No inconvenience can happen by this determination: but inconvenience might arise from a contrary determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action.' In notes appended to the report are comments on the inconsistent construction of the confession, and on the fact that the confession was not to the plaintiff but *aliunde*. See, also, Lord Mansfield's remarks in *Birt v. Barlow*, 1 Doug. 171, 99 Eng. Reprint, 113, and *Hemmings v. Smith*, 4 Doug. 32, 99 Eng. Reprint, 753. In the latter case the learned judge throws some light on the withheld definition of a marriage in fact. He says: "The law is well settled as to the evidence which the plaintiff must

give to prove the marriage in an action for criminal conversation. Reputation will not do for that purpose: a marriage in fact must be proved. But the identity of the person frequently does not appear to the minister who performs the ceremony, or the attesting witnesses. Therefore the identity, so as to connect the marriage in fact with the person in question in the action, may be proved by other persons or circumstances. Here the question is, whether there was any evidence of identity to be left to the jury. As to the weight of evidence, it depends on this, whether it is or is not answered. Loose evidence becomes cogent, when it is not answered. It is clear this woman passed as the plaintiff's wife at the time of the criminal conversation. That, however, only proves a reputation; not an actual marriage. But then there is a witness who says, that he remembers the plaintiff and a Miss Rixon; that they were acquainted, and that they were married together in the year 1769; that he saw them a month or two afterwards, and again in 1777 or 1778, and that she always went by the name of Mrs. Hemmings. It is true he never saw her since 1778; and it is possible she may be dead, and the plaintiff married to another person; but evidence need not be certain to every intent: Lord Coke defines certainty three ways (*Co. Litt.* 303a), certainty to a common intent, a certain intent in general, and a certain intent in every

crim. con., etc., may not be so also. It is very clear that they may, except in the matter of proof of the marriage. And it is not easy to perceive why an exception should be made in favor of defendants in such cases. If they have nothing better to rely upon for a defense than the non-existence of a marriage, they certainly could not complain of being put to show it, after *prima facie* evidence had been adduced on the other side.”⁷⁴ The rigor of the common-law doctrine has been ameliorated to a limited extent, in Massachusetts, by statutes which provide that when the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent.⁷⁵ The law, however, seems to be, that in the absence of any statute the doctrines are still extant. Bishop finds reason for them. He says,⁷⁶ though “they are truly founded in a justice which is nicely logical, and is less far from being practical than is sometimes assumed, still as occasionally administered mistakenly, they are not promotive of a just enforcement of the laws.” In addition, the effect of the statute has, to a certain extent, been minimized by construction. In a California case,⁷⁷ we find that in a suit for divorce on the ground of adultery the marriage will not be inferred from matrimonial cohabitation, with the reputation of being married persons, if the result of such inference be to prove the defendant guilty of bigamy. “In such cases actual marriage

particular. A certainty to every intent is not required here, and it is not the business of the court to lean in favor of adultery. I think the evidence, though weak, was sufficient to be left to a jury.” American authorities following these dicta are *Fenton v. Reed*, 4 Johns. (N. Y.) 52; 4 Am. Dec. 244; *Commonwealth v. Littlejohn*, 15 Mass. 163; *People v. Humphrey*, 7 Johns. (N. Y.) 314.

⁷⁴ *Young v. Foster*, 14 N. H. 114.

⁷⁵ See 1 Bish. Marr. Div. & Sep., § 1140. “Other states,” Bishop says, “have provisions more or less like this one to effect the same object.” See *State v. Armington*, 25 Minn. 29; *State v. Johnson*, 12 Minn. 476, 93; Am. Dec. 241; *Case v. Case*, 17 Cal. 598; *Patterson v. State*, 17 Tex. App. 102.

⁷⁶ *Id.*, § 1139.

⁷⁷ *Case v. Case*, 17 Cal. 598.

must be proven. The one hundred and twenty-first section of the act concerning crimes and punishments as to proof of marriage in prosecutions for bigamy, does not so change the common-law rule as to make mere cohabitation proof of marriage. This section simply obviates the necessity of proving the marriage by documentary or record evidence." That decision, however, is capable of, and therefore entitled to, explanation.⁷⁸ In those cases where any question of a public offense is involved, or where there is a conflict of two marriages, the presumption of the first marriage cannot arise, and therefore that and like decisions do not control, where the civil issue is that of criminal conversation. By the weight of authority now, the presumption of marriage may be created by proof of cohabitation and by repute, where the action is for divorce on the ground of adultery. The law may be taken to be that it is only in cases where the question of a public offense is involved that consent to marriage cannot be proved by evidence of cohabitation and repute of marriage; and the exception proceeds upon the ground that the presumption of marriage, without proof of actual marriage, cannot overcome the stronger presumption of innocence. Such evidence is admissible to show marriage, in an action for divorce upon the ground of mere adultery, which does not constitute a public offense.⁷⁹

⁷⁸ It has been explained in later Californian cases: See *infra*.

⁷⁹ *White v. White*, 82 Cal. 447, 7 L. R. A. 799, 23 Pac. 276. Bishop, in note 2 to § 756, 2d vol., Marr. Div. & Sep., says the court in this case proceeded under a misapprehension that the words "lawful" and "unlawful" in expositions like that in the text were synonymous with "indictable" and "nonindictable." His charge does not seem well grounded. The older case of *Case v. Case*, 17 Cal. 598, which was explained as not conflicting with *White v. White*, proceeded on the logical lines that where no offense was involved either directly or collaterally (we speak of offense in its technical as opposed to

its colloquial sense), and where there was no strife between two marriages, the marriage might be proved by evidence of cohabitation and repute. "The statement of the rule in *People v. Anderson*, 26 Cal. 133, as regards actions for divorce, is a mere dictum outside of the case and is not sustained by the decided cases or by the law." We think it possible that confusion has probably arisen from contrary views being taken of *Clayton v. Wardell*, 5 Barb. (N. Y.) 214, in which, however, there was a conflict of marriages rather than misconception of the sections quoted by the court from Bishop's *Marriage and Divorce*. In *Kilburn v. Kilburn*, 89 Cal. 51, 23 Am. St. Rep. 450, 26

§ 88a (87). **Presumption of marriage in criminal issues.** While we have not here to deal with the question of the evidence or weight of evidence required in criminal cases, though *en passant* we may say that the proofs in a criminal case should always be more exacting than in civil suits, the law undoubtedly is that a stricter rule obtains when the fact of marriage is in issue in a criminal case. Accordingly we find a long line of cases holding that when in a criminal case the result of proof of marriage would show the defendant to be guilty of bigamy, polygamy, adultery, incest, lascivious cohabitation or other crime, there must be direct proof of actual marriage.⁸⁰ In a recent Nebraska case⁸¹ it

Pac. 636, the question was only collaterally involved in the admissibility of evidence of marriage with the woman with whom the adultery was alleged to have been committed. See, also, *Collins v. Collins*, 80 N. Y. 1. The court held such evidence insufficient where the plaintiff did not testify that any marriage had taken place. Action for divorce on ground of desertion: *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507; on the ground of cruelty: *Harman v. Harman*, 16 Ill. 85; *Burns v. Burns*, 13 Fla. 369; *Morris v. Morris*, 20 Ala. 168; *People v. Beevers*, 99 Cal. 289, 33 Pac. 844; *Green v. State*, 21 Fla. 406, 58 Am. Rep. 672; *Cartwright v. McGown*, 121 Ill. 406, 2 Am. St. Rep. 116, 12 N. E. 737; *Trimble v. Trimble*, 2 Ind. 76; *Hutchins v. Kimmell*, 31 Mich. 131, 18 Am. Rep. 166; *Waddingham v. Waddingham*, 21 Mo. App. 628; *Wright v. Wright*, 6 Tex. 3; *United States v. Simpson*, 4 Utah, 229, 7 Pac. 257. See, also, the notes to *Londonderry v. Chester* (2 N. H. 268), 9 Am. Dec. 61; to *Cameron v. State* (14 Ala. 546), 48 Am. Dec. 111; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241; *Appeal of Reading Fire Ins. & Trust Co.*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; *Hiler*

v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181.

⁸⁰ Cases for *criminal conversation*: *Morris v. Miller*, 1 W. Black. 632, 96 Eng. Reprint, 366; *Birt v. Barlow*, 1 Doug. 171, 99 Eng. Reprint, 113; *Catherwood v. Caslon*, 13 Mees. & W. 261; for *bigamy or polygamy*: *Case v. Case*, 17 Cal. 598; *Henry v. McNealey*, 24 Colo. 456, 50 Pac. 37; *People v. Humphrey*, 7 Johns. (N. Y.) 314; *Clayton v. Wardell*, 4 N. Y. 230; for *adultery*: *Commonwealth v. Norcross*, 9 Mass. 492; *State v. Hodgkins*, 19 Me. 155, 36 Am. Dec. 742, and full note; for *incest*: *State v. Roswell*, 6 Conn. 446; for *lascivious cohabitation*: *Hopper v. State*, 19 Ark. 143; *Commonwealth v. Littlejohn*, 15 Mass. 163. A contrary rule prevails as to prosecutions for *abandonment*: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025. As marriage must be proved beyond a reasonable doubt, like other facts, a judgment of divorce is not admissible to show marriage: *State v. Sharkey* (N. J. L.), 63 Atl. 866. For proof of former marriage in prosecutions, see notes to *Cameron v. State*, 48 Am. Dec. 115; *Hiler v. People*, 47 Am. St. Rep. 228.

⁸¹ *Staley v. State*, 87 Neb. 539, 127 N. W. 878.

was laid down that when the state in a prosecution for bigamy proves that the defendant prior to his alleged bigamous marriage married a woman in the state of Iowa, and upon her cross-examination it appears that she and the defendant are first cousins, but no evidence is offered to prove they are cousins of the whole blood, it devolves upon the state to prove either that said cousins are of the half-blood, or that for other reasons the Iowa marriage is lawful. In such a case it is error to instruct the jury that there is a presumption that the Iowa marriage is lawful.

These cases proceed upon the theory that the presumption of marriage arising from mere evidence of cohabitation and repute is counterbalanced by the *presumption of innocence*. The reason is, that while ordinarily such evidence is sufficient, because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that a cohabitation is illicit if by presuming marriage it would be lawful, yet, in a prosecution for adultery, this presumption conflicts with the presumed innocence of the prisoner of the crime of which he is charged, and therefore such evidence in such cases cannot alone establish a marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof alone.⁸² On the other hand, there are cases which proceed upon the theory that one who cohabits with another and appears to the world to live in the marriage relation, substantially admits or confesses that such relation exists, and hence that such cohabitation and reputation and the conduct of the defendant in introducing another as husband or wife may be shown even in a criminal case.⁸³ It seems to be generally conceded that the confessions of the defendant deliberately made

⁸² Clayton v. Wardell, 4 N. Y. 230; Bailey v. State, 36 Neb. 808, 55 N. W. 241.

⁸³ Williams v. State, 44 Ala. 24; Williams v. State, 54 Ala. 131, 25 Am. Rep. 665; Parker v. State, 77 Ala. 47, 54 Am. Rep. 43; Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; Cook v. State, 11 Ga. 53, 56 Am.

Dec. 410; State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; Commonwealth v. Jackson, 11 Bush (Ky.), 679, 21 Am. Rep. 225; State v. Britton, 4 McCord (S. C.), 256; Dumas v. State, 14 Tex. Cr. App. 464, 46 Am. Rep. 241; Oneale v. Commonwealth, 17 Gratt. (Va.) 582.

afford proof of marriage in criminal cases. In a case⁸⁴ in the United States supreme court, Mr. Justice Woods said that it was not error that the trial court admitted the declarations and admissions of the defendant to prove the fact of his first marriage and the charge of the court was correct; "that the declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage, and that such marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence, and that it was not necessary to prove it by witnesses who were present at the ceremony. To hold that, on an indictment for bigamy, the first marriage can only be proven by eye-witnesses of the ceremony, is to apply to this offense a rule of evidence not applicable to any other. The great weight of authority is adverse to the position."⁸⁵ The rule seems to have been declared by the greater number of decisions that in criminal cases there must be *direct proof* of the marriage, and that proof afforded by the cohabitation, reputation and the conduct of the defendant are not sufficient. But there is much reason

⁸⁴ Miles v. United States, 103 U. S. 304, 26 L. Ed. 481, 483.

⁸⁵ State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; Dumas v. State, 14 Tex. App. 464, 46 Am. Rep. 241; Miles v. United States, 103 U. S. 304, 26 L. Ed. 481; Williams v. State, 54 Ala. 131, 25 Am. Rep. 665; Forney v. Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590; Jackson v. People, 2 Scam. (Ill.) 231. In *Reg. v. Simmonsto*, 1 Car. & K. 164, it was held that, "On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized." The same view is sustained by the following cases: *Regina v. Upton*, cited in 1 Car. & K. 165, note; and in 1 Russ. Crimes,

Greaves ed., 218; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; *Truman's Case*, 1 East P. C. 470; *Cayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 391; *State v. Hilton*, 3 Rich. 434; S. C., 45 Am. Dec. 783; *State v. Britton*, 4 McCord (S. C.), 256; *Warner v. Commonwealth*, 2 Va. Cas. 95; *Norwood's Case*, 1 East P. C. 470; *Commonwealth v. Murtagh*, 1 Ashm. (Pa.) 272; *Regina v. Newton*, 2 Moo. & R. 503; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *State v. McDonald*, 25 Mo. 176; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *State v. Seal's*, 16 Ind. 352; *Squire v. State*, 46 Ind. 459; *Arnold v. State*, 53 Ga. 574; *Brown v. State*, 52 Ala. 338; *Commonwealth v. Jackson*, 11 Bush (Ky.), 679, 21 Am. Rep. 225; *Williams v. State*, 44 Ala. 24.

and high authority for the view that the jury may find proof of marriage by other testimony than that of witnesses present at the ceremony; and that they may even in criminal cases determine whether cohabitation and reputation and the acts and statements of the accused under all the circumstances of the case constitute satisfactory proof.⁸⁶ In a Kentucky case, the majority of the best English and American decisions were reviewed by the court, and the conclusion drawn from them "that neither the common law of England, as adopted in this country, nor the American common law, as recognized by the courts of the various states requires us to hold that one charged with the crime of bigamy cannot be convicted upon clear and satisfactory proof of his declarations that the alleged wife is legally such, when those declarations are coupled with evidence of cohabitation with her, and her introduction by him into a community where he resides as his wife. We think the safety, the happiness, and the honor of families, the good order of society, the preservation of public morals, and a due regard to public decency and individual virtue, demand that the rules of the law should furnish every facility for the punishment of crime which a proper regard for the security of the innocent will allow."⁸⁷

⁸⁶ *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *Langtry v. State*, 30 Ala. 536; *Kinney v. State*, 3 Head (Tenn.), 544; *Ham's Case*, 11 Me. 391; *Squire v. State*, 46 Ind. 459; *Reg. v. Simmonsto*, 1 Car. & K. 164, 47 Eng. Com. L. 164; *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17, and note; *Commonwealth v. Jackson*, 11 Bush (Ky.), 679, 21 Am. Rep. 225; *George v. Thomas*, 10 U. C. Q. B. 604; 2 Greenl. Ev., § 461; 1 Whart. Ev., § 85 et seq.

⁸⁷ *Commonwealth v. Jackson*, *supra*. "It is difficult to perceive any reason for discriminating between admissions to prove a marriage and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class

of cases under consideration than in any other. Where the declarations of the prisoner and the fact that he has recognized and cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the prisoner was in fact married to the alleged wife, and unless they so believe they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which proof of actual marriage is necessary to make out his guilt upon the same legal footing with those charged with other

§ 89 (88). **No presumption arising from illicit cohabitation.**—The books abound with illustrations of how the law favors honor and honesty, chastity and truth, and therefore since this presumption of marriage from cohabitation and repute rests on the principle that the law presumes morality and innocence rather than crime, the presumption does not arise, if it follows logically as a result of such presumption that one of the parties has committed another equal or greater offense. For example, if it be shown that during the cohabitation one of the parties was cohabiting with another person, no presumption of marriage arises in either case.⁸⁸ This branch of the subject, which relates to cohabitations which are meretricious in their inception, is involved in the greatest uncertainty. When we are compelled to start with the conceded fact that the commencement of the intercourse was illicit, it is an exceedingly difficult question to determine from the authorities what facts and circumstances, short of proof of an actual marriage, will warrant a court or jury in deciding that the meretricious union no longer exists, but that the parties have in fact become husband and wife. The familiar principle of the presumption of continuance is frequently applied in such cases, and the courts have almost uniformly and universally adjudged that a cohabitation shown to have been illicit in its inception will be presumed to continue illicit, until the contrary is clearly established, or until a change is shown by evidence, showing the desire of the parties to live in marriage and not in illicit intercourse.⁸⁹

crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment."

⁸⁸ *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Jones v. Jones*, 48 Md.

391, 30 Am. Rep. 466; *Haupt v. Haupt*, 5 Ohio, 539; *Stevens v. Joyal*, 48 Vt. 291; *Hill v. State*, 41 Ga. 484; *Williams v. State*, 44 Ala. 24; *Harrison v. Lincoln*, 48 Me. 205; *Breakley v. Breakley*, 2 U. C. Q. B. 349; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245.

⁸⁹ *Port v. Port*, 70 Ill. 484; *Barnum v. Barnum*, 42 Md. 251; *State v. Worthingham*, 23 Minn. 528; *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802; *Floyd v. Calvert*, 53 Miss. 37; *Clayton v. Wardell*, 4 N. Y. 230; *Caujolle v. Ferrie*, 23 N. Y. 106; *Brink-*

But the *presumption* of the *continuance* of the illicit intercourse *may of course be overcome* by evidence showing that the character of the original connection has ceased. What will suffice to overcome this presumption depends largely upon the *animus* with which the parties formed their illicit connection. Where they have manifested a desire to live in a matrimonial union, and not in a state of concubinage, and during their cohabitation there has been a time when they might lawfully have married, a jury will be justified in finding a marriage from the mere fact of continued cohabitation apparently matrimonial, although it was for some reason meretricious in its inception. The fact that the relation was at first unlawful does not prevent the parties from entering into the contract of marriage when the impediment no longer exists, and, in the absence of statute, the contract may arise from mere private agreement on the part of the parties. Indeed, some of the authorities have gone so far as to presume a subsequent marriage against all probabilities of the case. The question is important, and the cases are unanimous in support of the true doctrine that where the evidence discloses the fact that the parties desired a matrimonial instead of a meretricious connection, the slightest circumstance should be held to afford sufficient evidence on which to predicate a finding of marriage.⁹⁰ Al-

ley v. Brinkley, 50 N. Y. 198, 10 Am. Rep. 466; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Harbeck v. Harbeck, 102 N. Y. 714, 7 N. E. 408; Yardley's Estate, 75 Pa. 207; Hunt's Appeal, 86 Pa. 294; Appeal of Reading Trust Co., 113 Pa. 204, 57 Am. Rep. 448, and note, 6 Atl. 60; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98. See note to this case by J. R. Berryman, in 18 Law Reg., N. S., 639; Cunninghams v. Cunninghams, 2 Dow. 483, 3 Eng. Reprint, 939; Lapsley v. Grierson, 1 H. L. Cas. 498, 9 Eng. Reprint, 853.

⁹⁰ Fenton v. Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; Van Buskirk v. Claw, 18 Johns. (N. Y.) 345;

Rose v. Clark, 8 Paige Ch. (N. Y.) 574; Caujolle v. Ferrie, 23 N. Y. 90; Betsinger v. Chapman, 88 N. Y. 487-499; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Holabird v. Atlantic Ins. Co., 12 Am. Law Reg., N. S., 566; North v. North, 1 Barb. Ch. (N. Y.) 241; Starr v. Peck, 1 Hill (N. Y.), 270; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113; Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; State v. Worthingham, 23 Minn. 528; Dickerson v. Brown, 49 Miss. 357; Floyd v. Calvert, 53 Miss. 37-46; Jones v. Jones, 45 Md. 144; Yates v. Houston, 3 Tex. 433-450; Campbell v. Campbell, L. R. 1 H. L. Sc. 182, 201, 204, 212, 215; Breadalbane's Case, L. R. 1

though, therefore, there must be an agreement to marry, changing the illicit connection to a lawful one, it is not necessary to prove any *formal ceremony*; and the evidence showing the new agreement may be circumstantial in its

Sc. D. App. 182; *De Thoren v. Attorney General*, 1 App. Cas. 686; *In re Taylor*, 9 Paige Ch. (N. Y.) 611; *Nathan's Case*, 2 Brewst. (Pa.) 149; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Collins v. Voorhees*, 47 N. J. Eq. 315, 24 Am. St. Rep. 412, 20 Atl. 676, 14 L. R. A. 366 The following abbreviated sketch of the most important of these cases is taken from *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence. In *Morris v. Davis*, 5 Clarke & F. 163, 7 Eng. Reprint, 365, Lord Lyndhurst, speaking of this presumption, says: "The presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." In *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, 1118, Lord Campbell said that the presumption could be negated only "by disproving every reasonable possibility," and Lord Brougham, in the same case, approved the general doctrine stated by Lord Lyndhurst in *Morris v. Davies*, and said that the presumption could be dispelled only by evidence which was "clear, distinct and satisfactory." The earliest case in our courts is *Fenton v. Reed*, *supra*. In that case the parties to the marriage came together under a void contract of marriage, supposing that a former husband was dead; but they continued their connection after the return of the first husband, and from that time until his death their

connection was known to be meretricious; but this fact was not considered sufficient to repel the presumption of a subsequent marriage. The same presumption was applied under circumstances very similar in *Rose v. Clarke*, *supra*; and in *Cauljolle v. Ferrie*, *supra*, a marriage was presumed to sustain legitimacy, although it appeared that the connection of the parties commenced in an illicit intercourse. The Breadalbane case, *supra*, decided by the house of lords, upon great consideration, is an authority of great weight in support of the finding of the jury in this case. The question in that case was one of legitimacy, depending upon the fact whether James Campbell, who, in 1781, eloped with the wife of one Ludlow, and with whom Campbell cohabited until his death in 1806, was married to her after the death of her first husband in 1784, and prior to the birth of their eldest son in 1788. A marriage was celebrated between them in Scotland in 1782, which was clearly bigamous. By the law of Scotland marriage may be contracted by the consent of the parties without any formal celebration or the presence of witnesses. There was no direct evidence of the interchange of consents between James Campbell and his alleged wife after the death of her first husband, but they were in Scotland after that time and before the birth of their eldest son, and they lived together as man and wife, and were reputed to be married. The court decided that there was a presumption of marriage between the parties subsequent to the death of Ludlow, Lord Westbury saying: "You must infer the consent to

character.⁹¹ While the evidence need not show the exact time or place or the circumstances under which the unlawful

have been given at the first moment when you find the parties able to enter into the contract." *De Thoren v. Attorney General*, *supra*, is also a very strong case of the application of the presumption of marriage. It appeared that on the 1st of July, 1862, William Ellis Wall obtained a decree *nisi* dissolving his then marriage, but which did not become final until the expiration of the period allowed for an appeal, during which time he could not legally marry again. In ignorance of this temporary disability he went through a ceremony of marriage at Glasgow with Miss Sarah Ogg on the 16th of July, 1862, before the time for appealing from the decree had expired, both parties believing that there was no obstacle to their marriage. They lived together as husband and wife and had children of the union. There was no evidence of any interchange of consents between them after the marriage in 1862, and neither had any suspicion, prior to the husband's death, of the invalidity of that marriage. The court, however, held that the parties must be presumed to have interchanged consents as soon as the impediment to their marriage was removed. It will be observed that in the *Breadalbane* case this presumption was indulged although the ceremonial marriage was known by the parties to be bigamous, and in *De Thoren's* case, although the parties regarded themselves as lawfully married, and the invalidity of the marriage was never known to them during the husband's life. In *Re Fitzgibbons' Estate*, 162 Mich. 416, 139 Am. St. Rep. 570, 127 N. W. 313, the man was twice married. He married the second time, knowing his first wife to be living, but concealed the fact from his second wife.

After some years the first wife died, and in ignorance of the death he continued living with the second until his death. The second wife *bona fide* believed herself his only wife. The court (four justices dissenting) held the facts sufficient to raise the presumption of a marriage on the removal of the impediment, that is, on the death of the first wife. The cases are collected in this decision, which followed *In re Wells' Estate*, 123 App. Div. 79, 108 N. Y. Supp. 164, and to which class of cases belong *Stein v. Stein*, 66 Ill. App. 526; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Busch v. Supreme Tent etc.*, 81 Mo. App. 562; *Townsend v. Van Buskirk*, 33 Misc. Rep. 287, 68 N. Y. Supp. 512; *In re Terwilliger's Estate*, 63 Misc. Rep. 479, 118 N. Y. Supp. 424.

⁹¹ *Foster v. Hawley*, 8 Hun (N. Y.), 68. A concubine cannot acquire the rights of a wife by survivorship. The marriage relation, however formed, is a sacred one, and sound public policy requires its sanctity be preserved inviolate. It is quite apparent that if married persons were permitted to make valid executory promises of future marriage with third persons, this policy would be at once subverted, and the practical evils of polygamy would receive the sanction of the law. The question, therefore, is one of fact to be determined by the application of legal rules to the evidence in the case. Concubinage which has existed for a long period cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such a contract, it is true, may be proved by circumstances, but they must be such as exclude the infer-

connection was changed to a lawful one,⁹² yet the circumstances should be such as to exclude the inference that the meretricious connection still continues.⁹³ And yet the courts should look with favor upon any facts or circumstances which tend to show that the union has become law-

ence of presumption that the former relation continued, and satisfactorily prove that it had been changed into that of an actual marriage by mutual consent: Per Lord Campbell, *Queen v. Millis*, 10 Clarke & F. 749 et seq., 8 Eng. Reprint, 844; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677. H., a native-born citizen of the United States, went to England, and there prior to May, 1871, commenced an illicit intercourse with a woman, an English subject. In May, 1871, he gave her a ring, saying that if she would wear it and be true to him he would consider her his wife as if they had been married in church, and she accepted the ring on these conditions, and from that time until his death in 1874 he openly lived and cohabited with her, in England, in the apparent relation of husband and wife, introducing her as his wife, and having children by her. In June, 1871, he took her to Paris, and there introduced her as his wife. On the foregoing facts, in the absence of proof of a marriage in England, and of the marriage law of France, held (1), that the illicit origin of the intercourse in England rebutted the presumption of marriage which would otherwise have arisen from the cohabitation and its circumstances; but (2) that the jury were warranted in finding that there was the requisite consent in Paris to establish a valid marriage according to New York law, and that the children of such marriage were entitled to inherit their father's estate in New York: *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113. A man, mar-

ried in Maryland, subsequently married another woman in Kentucky, his first wife being alive. He continued for the rest of his life to live with his second "wife" after the death of the first wife in Maryland. Speaking of the parties to the second marriage the court said: "It appears that after the death of the Maryland wife, they lived together and cohabited as man and wife, recognized that relation as subsisting between them, with the general reputation and understanding that they were such, for near twenty years. During all that period the proof is, that the conduct of defendant was that of a faithful, prudent, industrious and economical wife. They, moreover, raised a family of children which were recognized as legitimate, and at the death of the father, were held by the court of the county where they had been born and raised, to be his lawful heirs and entitled to his estate, and their mother as his lawful wife, to be entitled to dower. These facts authorize, we think, the presumption of a marriage after the death of the first wife, and justify the conclusion that the defendant was the lawful wife of Donnelly at his death."

⁹² *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Caujolle v. Ferrie*, 23 N. Y. 90; *Hyde v. Hyde*, 3 Bradf. Surr. (N. Y.) 509; *Queen v. Millis*, 10 Clarke & F. 749, 8 Eng. Reprint, 844.

⁹³ *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Lapsley v. Grierson*, 1 H. L. Cas. 498, 9 Eng. Reprint, 853; *Foster v. Hawley*, 8 Hun (N. Y.), 68.

ful. In numerous cases, the courts in their desire to follow the maxim, *semper praesumitur pro matrimonio*, have sustained the finding of juries in favor of marriage, although the probabilities were very strong that no new agreement had actually taken place.⁹⁴ On the other hand, there is another class of decisions which apply a somewhat stricter rule; which seem to lean toward the view that the continued connection will be referred to the commencement of the unlawful union between the parties, unless there is clear evidence showing the intention to change the nature of such union. Following the same tendency these decisions require more direct or formal proof that a marriage has taken place.⁹⁵ Where the cohabitation has been illicit by reason of one of the parties having a husband or wife living, and where the cohabitation continues after the death of such husband or wife, it is generally for the jury to determine, under proper instructions from the court, whether a lawful marriage may be inferred.⁹⁶ In determining the question it is relevant to show that the original union, though unlawful, was in *good faith*; on the contrary, the knowledge of the parties that the impediment to marriage had been removed and the desire of the parties to live in lawful matrimony or the reverse; all these and other facts may have a material bearing in determining whether the parties have agreed to change the illicit connection into legal marriage or whether continued cohabitation is to be referred to its unlawful inception.⁹⁷ Of course, on such inquiry, the circumstance that the parties represented themselves to be husband and wife,

⁹⁴ *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Wilkinson v. Paine*, 4 Term Rep. 468, 100 Eng. Reprint, 1123; *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, 1118; *Yates v. Houston*, 3 Tex. 433; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677.

⁹⁵ *Appeal of Reading Trust Co.*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Voorhees v. Voorhees*, 46 N. J. Eq.

411, 19 Am. St. Rep. 405, 19 Atl. 172.

⁹⁶ *State v. Worthingham*, 23 Minn. 528; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Lapsley v. Grierson*, 1 H. L. Cas. 498, 9 Eng. Reprint, 853. This is especially true if there is any evidence tending to show a change from the unlawful union.

⁹⁷ This is illustrated in most of the cases cited in this section. See, also, *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Land v. Land*, 206 Ill. 288, 99 Am. St. Rep. 171, and note, 68 N. E. 1109.

when they knew they were not, may be reasonably taken into account in estimating their subsequent conduct.⁹⁸ The following rules have been fairly deduced from the cases cited: 1st. That an illicit connection is presumed to continue until there is evidence to the contrary. 2d. That where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance; and that a mere continuance of the cohabitation without any apparent change after the parties have the right to contract a valid marriage, will suffice to justify a submission of the question of marriage to a jury. The court must, under such circumstances, submit the question to the jury. 3d. That where the parties are shown to have preferred a meretricious connection, something more than continued cohabitation after the impediment to a legal marriage has been removed, will be necessary to rebut the inference of the continuance of the original character of the cohabitation. There must be evidence to satisfy the mind of an actual change in the relation between the parties, or at least of a desire for a change. Although it has never been authoritatively settled, it is yet safe to assert that should there be any evidence warranting the conclusion that the parties to a deliberately preferred illicit connection have come to desire a matrimonial alliance in place of their former illegal and lustful union, mere evidence of their cohabitation as husband and wife subsequently to their change of sentiment in this regard would make the issue of marriage one of fact, just the same as though the parties had desired marriage from the commencement of their cohabitation. 4th. That where there is any evidence to rebut this inference of continuance of an illicit union, the question is one of fact.⁹⁹ 5th.

⁹⁸ *Campbell v. Campbell*, L. R. 1 H. L. Sc. App. 182.

⁹⁹ In some states it has been held that facts, to support a presumption of a new contract, must be shown: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Howland v. Burlington*, 53 Me. 54; *Randlett v. Rice*, 141 Mass. 385, 6

N. E. 238. See, also, *In re Fitzgibbon's Estate*, 162 Mich. 416, 139 Am. St. Rep. 570, 17 Del. Leg. N. 607, 127 N. W. 313; *Fort Worth & R. G. R. Co. v. Robertson*, 55 Tex. Civ. App. 309, 121 S. W. 202; *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Collins v. Voorhees*, 47 N. J. Eq. 315, 24 Am.

That where the parties have manifested a preference for an illegal connection, the court is bound to decide against a marriage in the absence of evidence of a change in the relation between the parties, or of a desire for such a change. 6th. That to convert an illicit union into a valid marriage, the parties must do something more than recognize as valid the unlawful marriage, where consents have been interchanged when an impediment to a lawful marriage existed; they must enter into a new marriage contract after the impediment has been removed.¹⁰⁰ 7th. Another rule is well settled by decisions which have not yet been cited; and that

St. Rep. 412, 14 L. R. A. 366, 20 Atl. 676; Hunt's Appeal, 86 Pa. 294; Severa v. Beranak, 138 Wis. 144, 119 N. W. 814.

¹⁰⁰ From valuable note appended to Appeal of Reading Fire Ins. & Trust Co. (113 Pa. 204, 6 Atl. 60), 57 Am. Rep. 451. In an equally valuable note in 16 Current Law, Marriage, § 1 (adapted from 9 Mich. L. R. 54), an analysis of the cases is made and they are divided into three classes: 1. When the first union of the parties was known to both parties to be illicit, in which case a new contract must be shown. To this class belong the cases of White v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; Rose v. Rose, 67 Mich. 619, 35 N. W. 802; Clark v. Barney, 24 Okl. 455, 103 Pac. 958; while Breadalbane's case, *supra*, is cited as contrary to this doctrine. 2. As in rule 2 in the text, where the parties desiring marriage and the impediment is unknown to either, lawful marriage will be presumed, *eo instante* the impediment is removed. This is supported by Manning v. Spurek, 199 Ill. 447, 65 N. E. 342; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Land v. Land, 206 Ill. 288, 99 Am. St. Rep. 171, 68 N. E. 1109; Eaton v. Eaton, 66 Neb. 676, 60 L. R. A. 605, 1 Ann. Cas. 199, 92 N. W. 995; Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 111 Am. St. Rep. 658, 3 L.

R. A., N. S., 244, 6 Ann. Cas. 483, 62 Atl. 680; Lufkin v. Lufkin, 182 Mass. 476, 65 N. E. 840; Schuchart v. Schuchart, 61 Kan. 597, 78 Am. St. Rep. 342, 50 L. R. A. 180, 60 Pac. 311; Teter v. Teter, 88 Ind. 494. 3. Where one party knows of an impediment, but conceals it from the other, who in good faith enters into marital relations under a void ceremonial marriage. On this class there is a direct conflict, which the discussion in *Re Fitzgibbon's Estate*, *supra*, discloses. So far as our own opinion may be of aid in unraveling the tangle, we think that in such case of concealment the status of the party injured by the concealment should be just the same as that of the parties in class 2. Notwithstanding the strong dissent in the case last named, and Mr. Justice Brooke's apparent demolition of the argument for the prevailing opinion, we feel that the prevailing opinion that the second wife (all the time supposing she was the lawful wife, "the man having so represented her to the public, and to herself after the legal impediment passed away") was presumed to be the lawful wife on the removal of the impediment, is the better law, and it not only was bare justice to hold that she was then his legal wife, but it would have been a miscarriage of justice to have denied it.

is that where a mutual desire for marriage is, under the peculiar circumstances of any case, improbable, the presumption of marriage will not be very readily indulged, as where a countess cohabited with her footman;¹ or a negro with a white person;² or where the woman was a common prostitute.³ Even divorces have been presumed to sustain a marriage made while one of the parties to a former marriage was living.⁴

§ 90 (89). Other presumptions growing out of the marriage relation.—So far, only those presumptions arising out of the relations *inter se* between husband and wife and concerning them with reference to the fact of marriage have been considered. But there are others which arise from the duty of either both or one of them toward others, or from the duty of others toward them or either of them, more especially with reference to property as opposed to the personal duties and obligations referred to. Thus if a husband, temporarily absent from home, leaves his wife in possession of his property and appoints no one else as his *agent*, it will be presumed that he expects her to act as his agent in respect to its care and protection.⁵ But the agency of the husband for the wife must be proved; it will not be presumed from the marital relation.⁶ It is presumed, when

¹ Forbes v. Strathmore, Ferg. Consist. Law Rep.

² Armstrong v. Hodges, 2 B. Mon. (Ky.) 69. But the presumption of marriage from cohabitation between a white and a colored person is undoubtedly sufficient to warrant a finding of a valid marriage: Honey v. Clark, 37 Tex. 686; Bonds v. Foster, 36 Tex. 68. However, this presumption will not arise where the statute forbids such marriage: Oldham v. McIver, 49 Tex. 556.

³ Couran v. Lowe, 1 Lee (Ecc. Cas.), 630; Chamberlain v. Chamberlain, 71 N. Y. 423.

⁴ Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Carroll v. Carroll, 20 Tex. 731; McCarty v.

McCarty, 2 Strob. (S. C.) 6-10, 47 Am. Dec. 585; but see Ellis v. Ellis, 58 Iowa, 720, 13 N. W. 65; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; and see generally on this subject, Best, Presump. 144, 145; 1 Bish. Mar. Div. & Sep. 1143-1149.

⁵ 1 Bish. Mar. Div. & Sep. §§ 1206-1209, and cases; Stew. Mar. & Div., § 174; Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686.

⁶ Rust Owen Lumber Co. v. Holt, 60 Neb. 80, 82 N. W. 112, 83 Am. St. Rep. 512, and note on agency of the husband in connection with mechanic's liens on separate property of married women.

they are living together, that the husband is the head of the family.⁷ A married woman, whether her husband is absent or at home, sick or in health, is not presumed to be his agent generally, or to be intrusted with authority in respect to his affairs, other than that which is usual and customary to confer upon the wife.⁸ But an agency may be more readily presumed from the acts and condition of a wife than in ordinary cases.⁹ While they are living together, the law presumes that she has authority to purchase necessities and supply ordinary household wants, and that purchases and contracts made by her for these purposes are made as his agent.¹⁰ And the burden of proof is on him to show that he has made suitable provision for her.¹¹ On the other hand, if a husband and wife are living apart permanently, the presumption of authority on her part to bind him for necessities ceases.¹² There is no rule of law or principle of justice which would raise a presumption of agency in favor of a wife to enforce an obligation on the part of her husband which, for her own fault, has ceased to exist. In case of the wife's desertion of her husband, the presumption changes to the side of the husband, and the burden is upon

⁷ *Clinton v. Kidwell*, 82 Ill. 427.

⁸ *Sawyer v. Cutting*, 23 Vt. 486.

⁹ *Shelton v. Pendleton*, 18 Conn. 417, 422; *Brown v. Woodward*, 75 Conn. 254, 260, 53 Atl. 112.

¹⁰ *Gotts v. Clark*, 78 Ill. 229; *Bonney v. Perham*, 102 Ill. App. 634; *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834; 1 Bish. Mar. & Div., § 1197; *Montague v. Benedict*, 3 Barn. & C. 631, 107 Eng. Reprint, 867; *Freestone v. Butcher*, 9 Car. & P. 643; *Emmett v. Norton*, 8 Car. & P. 506; *Jewsbury v. Newbold*, 40 E. L. & Eq. 518; *Phillipson v. Hayter*, L. R. 6 C. P. 38. See, also, *Debenham v. Mellon*, L. R. 5 Q. B. 394; *Powers v. Russell*, 26 Mich. 179; *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Pickering v. Pickering*, 6 N. H. 120; *Keller v.*

Phillips, 39 N. Y. 351; *Bradt v. Shull*, 46 App. Div. 347, 61 N. Y. Supp. 484; *Williams v. Coward*, 1 Grant Cas. (Pa.) 21; *Stall v. Meek*, 70 Pa. 181; *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382; 1 Bish. Mar. Div. & Sep., § 1197.

¹¹ *Tebbetts v. Hapgood*, 34 N. H. 420.

¹² *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Boney v. Perham*, 102 Ill. App. 634; *Olson Co. v. Youngquist*, 76 Minn. 26, 78 N. W. 870; *Bostwick v. Brower*, 49 N. Y. Supp. 1046, 22 Misc. Rep. 709; *Hatch v. Leonard*, 71 App. Div. 32, 75 N. Y. Supp. 726; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Walker v. Simpson*, 7 Watts & Serg. (Pa.) 83, 42 Am. Dec. 216; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Rea v. Durkee*, 25 Ill. 503; *Sturtevant v. Starin*, 19 Wis. 268.

the plaintiff who seeks to recover for necessities furnished the wife, with knowledge of the separation, to show that they either lived apart by mutual consent, or that the separation was occasioned by the fault or misconduct of the husband.¹³ It has already been seen that where a husband and wife are living together, the law raises a presumption that she is authorized to make contracts for the supply of articles suitable and necessary to their means and station of life. This presumption is strengthened when he, by previous dealings, permits her to exercise this power and acquiesces therein. When he thus permits her to be held out as his agent, there is no doubt of his liability for her contracts in relation to necessities, until he gives notice that the agency is terminated.¹⁴ And the same is true as to contracts other than for necessities.¹⁵ A wife has, under proper circumstances, presumed authority to employ a domestic servant without the assent of her husband, and he will be liable for the services rendered.¹⁶ There is like authority and liability in the case of a seamstress to do work in the family.¹⁷ The presumption of the wife's authority to obtain credit for necessities may be rebutted, for example, by proof that the purchases were not made on the credit of the husband, but on that of the wife's separate estate, or on the credit of a third person,¹⁸ or by proof that the husband had notified the tradesman in advance not to give credit, in

¹³ *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172.

¹⁴ *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533; *Chaix v. Villejoin*, 7 La. 276; *Sterling v. Potts*, 5 N. J. L. 773.

¹⁵ *Howe v. Finnegan*, 61 App. Div. 610, 70 N. Y. Supp. 19; *Sibley v. Gilmer*, 124 N. C. 631, 32 S. E. 964.

¹⁶ *Phillips v. Sanchez*, 35 Fla. 187, 17 South. 363; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308.

¹⁷ *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72; *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759. See note to *Wanamaker v. Weaver* (176 N. Y. 75, 63

N. E. 135, 65 L. R. A. 529), 98 Am. St. Rep. 621, on the implied authority of the wife to act for the husband and charge him for necessities, in which the whole subject is treated.

¹⁸ *Pearson v. Darrington*, 32 Ala. 227; *Stammers v. Macomb*, 2 Wend. (N. Y.) 454; *Moses v. Fogartie*, 2 Hill (S. C.), 335; *Carter v. Howard*, 39 Vt. 106; *Swett v. Penrice*, 24 Miss. 416; *Simons v. McElwain*, 26 Barb. (N. Y.) 419; *Weisker v. Lowenthal*, 31 Md. 413; *Holt v. Brien*, 4 Barn. & Ald. 252, 106 Eng. Reprint, 930; *McMahon v. Lewis*, 4 Bush (Ky.), 138.

cases where he himself is not delinquent.¹⁹ So when the husband uses as his own the property of the wife with her consent and acquiescence, a *gift* from her will be presumed.²⁰ Though there is a presumption, where the purchase price of real property is paid by a husband and the deed is taken in the name of the wife, that the conveyance is a gift to her, the presumption is not conclusive, and is rebuttable. The question whether the transaction is a gift or a resulting trust is one of intention.²¹

§ 90a (89). Same—Community property.—Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption above mentioned is con-

¹⁹ 1 Bish. Mar. & Div., § 1196.

²⁰ Courtwright v. Courtwright, 53 Iowa, 57, 4 N. W. 824; Hamilton v. Lightner, 53 Iowa, 470, 5 N. W. 603; Sabel v. Slingluff, 52 Md. 132; Jacobs v. Hesler, 113 Mass. 157; Reeder v. Flinn, 6 Rich. (S. C.) 216; Lishey v. Lishey, 2 Tenn. Ch. 5; Kuhn v. Stansfield, 28 Md. 210, 92 Am. Dec. 681. This rule is based on the disability of husband and wife to contract with each other, and where the disability has been removed by statute no such presumption prevails: In re Nieman, 109 Fed. 113; Chadburn v. Williams, 45 Minn. 294, 47 N. W. 812; Stickney v. Stickney, 131 U. S. 227, 33 L. Ed. 136, 9 Sup. Ct. Rep. 677. On the presumptions flowing from the marriage ceremony, see note to Vreeland v. Vreeland, 34 L. R. A., N. S., 940. On the presumption as to common hoard when earnings of both spouses of the family are invested in the name of one spouse, see note to Beck v. Beck, 35 L. R. A., N. S., 713.

²¹ Gould v. Glass, 120 Ga. 50, 47 S. E. 505; Jackson v. Williams, 129 Ga. 716, 59 S. E. 776; Pool v. Phillips, 167 Ill. 432, 47 N. E. 758; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; Stevens v. Stevens, 70 Me. 92; Edgerly v. Edgerly, 112 Mass. 175; Lahey v. Broderick, 72 N. H. 180, 55 Atl. 354; Persons v. Persons, 25 N. J. Eq. 250; Lister v. Lister, 35 N. J. Eq. 49; Scott v. Calladine, 79 Hun, 79, 29 N. Y. Supp. 630, affirmed in 145 N. Y. 639, 41 N. E. 90; Moore v. Moore, 165 Pa. 464, 30 Atl. 932; Hickson v. Culbert, 19 S. D. 207, 102 N. W. 774; Corey v. Morrill, 71 Vt. 51, 42 Atl. 976; Stickney v. Stickney, 131 U. S. 227, 33 L. Ed. 136, 9 Sup. Ct. Rep. 677. See note to Stonecipher v. Kear, 131 Ga. 688, 127 Am. St. Rep. 248, 63 S. E. 215, on when a resulting trust arises in favor of a husband or wife who pays the purchase price and takes title in name of the other spouse.

clusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.²² The presumptions invariably pivot around the actual acquisition of the property, and on this point Ballinger, in his work on Community Property, says: "The root or property source together with the time when acquired are alone looked to as the criterion to determine what property is or is not common. . . . Property once impressed with the community character retains that impress during the existence of the community, unless alienated or exchanged."²³ The presumption is that all property found in the name or pos-

²² Cal. Civ. Code, § 164. These presumptions which may be said to exist independently of their special enactment as in the various code states have received recent consideration in three Californian cases: *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308; *Fulkerson v. Stiles*, 156 Cal. 703, 26 L. R. A., N. S., 181, 105 Pac. 966, and *Ives v. Connacher*, 162 Cal. 174, 121 Pac. 394.

²³ Ballinger on Com. Prop., § 19. See, also, *Noe v. Card*, 14 Cal. 577; *Morgan v. Lones*, 80 Cal. 317, 319, 22 Pac. 253; *Carlson v. Carlson*, 10 Cal. App. 300, 101 Pac. 923. In *Ives v. Connacher*, *supra*, the court says: "As we have seen, the deed for this property was actually delivered and the legal title vested in the purchasers upon the making of the first payment, notes secured by mortgage on the property being taken by the grantor for the balance due. The property was then acquired. All the money paid being community property, and there being nothing, in view of the admissions made by the pleadings, warranting a conclusion from the fact that the wife was named in the deed as a grantee with her husband that she took any interest therein as her separate property, the mere fact that these notes and the mortgage were executed by the wife as well as the husband does not affect the ques-

tion of community or separate property: See *Flournoy v. Flournoy*, 86 Cal. 286, 293, 21 Am. St. Rep. 39, 24 Pac. 1012; *Martin v. Martin*, 52 Cal. 235. It cannot be disputed, we think, that where property is purchased and partly paid for with community funds, and a note and mortgage on the same are given to secure the unpaid balance, the property is community property. We do not see how the status of this property as community property can be held necessarily to have been changed by the mere fact that the first two notes secured by the mortgage were paid from the separate property of the wife. It is, of course, settled in this state that a husband and wife may agree to transmute separate property of either into community property, or community property into separate property (see *Title Ins. & Trust Co. v. Ingersoll*, 153 Cal. 1, 94 Pac. 94), but certainly no such agreement is necessarily to be inferred from the mere fact of such payments as are shown in this case: See *Carlson v. Carlson*, *supra*. Rather is it to be presumed, nothing else appearing, that the money of the wife was advanced by her for the benefit of the community, to assist in discharging a lien on community property, than that it was intended to give her a separate property interest in the land."

session of either spouse during marriage is *prima facie* common. "This presumption," says McKay,^{23a} "begins the moment of marriage and continues till the marital partnership is dissolved; it does not apply to property acquired after the dissolution of the community but it does apply to all property in the name, or hands, of either spouse at the time of dissolution; accordingly, proof that the property in question was in the hands, or name, of either spouse, at the time of dissolution, raises the presumption that it is common."

§ 91 (90). Same—Of coercion by the husband.—Although the subject of the presumed coercion of the wife by her husband is most frequently discussed in works on criminal evidence, notice must be here taken of it, in order that the reader may have in one view presented to him the whole of those presumptions which the existence of the marriage relation has brought about, and that the aspect of the doctrine of coercion in civil issues with regard to torts by the wife may be viewed. The familiar rule of the criminal law is that acts of a criminal nature committed by the wife in the presence of her husband are presumed to be compelled by him.²⁴ Blackstone puts it thus: "As to persons in pri-

^{23a} McKay on Community Property, § 255. See, also, the following sections in which the learned author deals with the practical force of the presumption and the reasons supporting it.

²⁴ See extended notes to *Henley v. Wilson* (137 Cal. 273, 58 L. R. A. 941, 70 Pac. 21), 92 Am. St. Rep. 164, on liability of a husband for the torts of his wife, and to *Commonwealth v. Neal* (10 Mass. 152), 6 Am. Dec. 106, on the husband's responsibility for the tortious acts of his wife, civil and criminal, and to *Brazil v. Moran* (8 Minn. 236), 83 Am. Dec. 776, on torts of married women; *Rex v. Price*, 8 Car. & P. 19; *Davis v. State*, 15 Ohio, 72, 45 Am. Dec. 559; *State v. Nelson*, 29 Me.

329; *Commonwealth v. Trimmer*, 1 Mass. 476; *State v. Williams*, 65 N. C. 398; *Commonwealth v. Neal*, 10 Mass. 152, 6 Am. Dec. 105; *Story v. Downey*, 62 Vt. 243, 20 Atl. 321; *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498, 62 S. W. 692; *Rex v. Connolly*, 2 Lew. C. C. 229 (*uttering counterfeit money*); *Rex v. Archer*, 1 Moo. C. C. 143 (*burglary and receiving stolen goods*); *Rex v. Knight*, 1 Car. & P. 116 (*larceny*); *Commonwealth v. Burk*, 11 Gray (Mass.), 437 (*selling intoxicating liquors*); *People v. Townsend*, 3 Hill (N. Y.), 479 (*nuisance*); *State v. Williams*, 65 N. C. 398; *Commonwealth v. Neal*, 10 Mass. 152, 6 Am. Dec. 106 (*assault and battery*). For illustrations of the extent to which the rule was

vate relations: the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though

formerly carried, see notes to *Rex v. Knight*, 1 Car. & P. 116. This presumption *does not apply* to cases of *treason or murder* (*Miller v. State*, 25 Wis. 384), and perhaps not in cases of *highway robbery*: *Rex v. Stapleton*, 1 Craw. & D. 163; *People v. Wright*, 38 Mich. 744, 31 Am. Rep. 331; *Rex v. Torpey*, 12 Cox C. C. 45; *Bibb v. State*, 94 Ala. 31, 33 Am. St. Rep. 88, 10 South. 506; *felonious wounding*: *Rex v. Smith*, 8 Cox C. C. 27; or the *keeping of bawdy-houses*: *Rex v. Dixon*, 10 Mod. 335, 88 Eng. Reprint, 753; *Reg. v. Williams*, 1 Salk. 384, 91 Eng. Reprint, 334; *State v. Bentz*, 11 Mo. 27. The husband and wife may be jointly indicted for keeping a bawdy-house: *State v. Bentz*, 11 Mo. 27. In *McLain on Criminal Law*, section 148, it says: "When husband and wife live together, he is presumed to be the head of the family, and regardless of ownership, he is presumed to be liable for an unlawful use of the house, and, to render her liable, it must appear that she was active in giving such permission, and in failing to prevent such use." Testimony showing that the defendant's wife was receiving money for improper relations with the witness at her home, and that when her husband was drunk and injured from a blow on the head so that he was seriously injured, and in no condition to manage or be responsible for the affairs of the household, the defendant was lying with a man in a compromising position at night in an unlighted room in the house, and the further fact that a number of witnesses testified that her reputation

as a lewd woman was bad, was ample from which the jury could find that she, as well as her husband, was the keeper of the house: *State v. Keithley*, 142 Mo. App. 417, 127 S. W. 406. See, also, *People v. Wheeler*, 142 Mich. 212, 105 N. W. 607. The presumption has been wholly abolished in Connecticut: *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855; and in Illinois and Kansas the trend of the decisions is the same way. "A liability which has for its consideration rights conferred should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved": *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578. Almost identical views are expressed in *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489, 4 Pac. 862, where the court conclude: "Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it." From the note referred to in 6 Am. Dec. 105, we make the following excerpts: The protection of the law is also extended to exempt a *feme covert* from a criminal prosecution for acts which

in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offenses. And therefore if a woman commit theft, burglary or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion;

she has done by reason of her husband's coercion. In *Hensly v. State*, 52 Ala. 10, it is laid down that "An offense, not *malum in se*, committed by a married woman in the presence and with the knowledge of her husband, is presumed to have been committed by his authority, and he is punishable by indictment for it, if it be an indictable offense"—a case in which the husband was indicted, under the act prohibiting the sale of spirituous liquors without a license, for a sale made by his wife in his presence. In *Mulvey v. State*, 43 Ala. 316, 94 Am. Dec. 684, an indictment for a similar offense, it was held that the fact that the wife owned and kept the store where the sale of the liquor was made, and that the husband had no interest in it and did not sell the liquor, did not excuse him, it being clearly shown that the sale was made in his presence and by his direction. So, also, *Commonwealth v. Barry*, 115 Mass. 146; *Commonwealth v. Eagan*, 103 Mass. 71; *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706; *State v. Williams*, 65 N. C. 400. The presumption of coercion also arises in cases of joint offenses by the husband and wife: *State v. Potter*, 42 Vt. 495. A married woman may be indicted alone for her criminal acts: *State v. Haines*, 35 N. H. 207; *Commonwealth v. Eagan*, *supra*; and *State v. Williams*, *supra*; and it is not necessary to negative the coercion: *State v. Nelson*, 29 Me. 329. Under the Arkansas statutes, if a wife commits crime of any degree, under the threat, command or coercion of her husband, she shall not be

found guilty, but such coercion must be made to appear and will not be presumed merely from the husband's presence: *Freel v. State*, 21 Ark. 212; *Edwards v. State*, 27 Ark. 493. An exception to the general rule of the wife's exemption on the ground of coercion has been made in regard to certain crimes which from their malignity render it improbable that the wife would be constrained by her husband without the separate operation of her own will in their commission, and in regard to those crimes in which women are supposed peculiarly to participate: 1 Bishop on Criminal Law, § 361. To what cases this exception exactly applies has not been definitely settled. The books generally recognize treason as within its provisions: *Somerset's Case*, 1 State Trials, 28, 29. So, also, murder: 4 Bl. Com. 29; 1 Russell on Crimes, 33. And according to 1 Russell on Crimes, 33, robbery. Of those offenses in which a woman is supposed to peculiarly participate is the keeping of a bawdy-house: *Commonwealth v. Wood*, 97 Mass. 225; *State v. Bentz*, 11 Mo. 27; 4 Bl. Com. 29. Wharton on Criminal Law, volume 1, section 72, lays down: "It may be questioned, however, whether the coercion and presence of the husband is not now a good defense in all cases, and whether the exception taken as to the higher grades of felonies still obtains, and the better opinion now is not to recognize such an exception." Upon the whole, however, the responsibility of a married woman for her criminal acts may be stated, as laid down in a learned and exhaustive review of

she is not guilty of any crime; being considered as acting by compulsion and not of her own will.”²⁵ In the theory and spirit of the law, she, under the marital relation, was deprived of the free will and consent necessary to the commission of crime, and she was therefore accorded the legal *status* of a servant or slave. So it has been consistently held in all jurisdictions that have inherited the common law, except where the rule is changed by statute; that where the married woman commits an offense (except probably murder and manslaughter, Hale P. C. 47), in the presence of her husband or though not in his presence, near enough to be under his immediate influence and control, she is presumed to have acted not voluntarily, but under his coercion, and he is responsible while she is excused.²⁶ That she was more active than he in the commission of the crime does not render her guilty, but is a circumstance to be considered in rebutting the presumption of coercion, for her guilt depends,

the cases upon this subject, by Bennett and Heard, in volume 1 of their Leading Criminal Cases, page 81: 1. There is no objection in law to an indictment against the wife alone, charging her directly with an offense; 2. There is no objection in law to an indictment charging a husband and wife jointly with the commission of an offense; 3. If upon the trial of the wife alone, or jointly with her husband, it appear in evidence that the husband was actually present when the wife committed the act, his coercion will, with some exceptions, be presumed, and the wife should be acquitted.

²⁵ 4 Bl. Com., p. 28; and he continues: “Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon. And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or

freeman only was punished, the female or slave dismissed: ‘*Procul dubio quod alterum libertas, alterum necessitas impelleret*’ (because doubtless the one did it of his own free will, the other of necessity). But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives the rule admits of an exception in crimes that are *mala in se* (wrong in itself), and prohibited by the law of nature, as murder and the like; not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society.”

²⁶ 1 Hale P. C., § 10; Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; Roberts v. People, 19 Mich. 401; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684.

not on her activity, but upon whether her activity was voluntary or caused by the husband's coercion.²⁷ A married woman, engaged by her husband in his store in the sale of obscene cards, is presumed in law to be selling the same under his coercion, and the common law which exempted her from legal responsibility for such act, still subsists in the state of New Jersey. Where the evidence of such fact is clear and unequivocal, a verdict of acquittal should be directed.²⁸ But there must be some evidence that the woman is the wife of the man said to coerce her. The mere calling a woman by the name of the male defendant with "Mrs." in front of it is not sufficient to raise any presumption of marriage between them.²⁹ The civil responsibility of the husband for the torts committed by his wife resolves itself into: 1. His responsibility for her torts committed in his presence, and by his direction; 2. His responsibility for her torts committed jointly with him; and 3. His responsibility for her torts committed by her not in his presence, or not by his direction. The disability attached to a married woman at common law in respect to many acts which she could have performed if *sole* was turned to her protection in regard to her offenses against others, when committed under certain circumstances. The unity arising from the marital relation, and the presumption of superiority in the husband and his influence over his wife, were reasons urged to exempt her from punishment for certain wrongs perpetrated by her when in his immediate presence. It was the presumed coercion of the wife by the husband that rendered him alone civilly liable for injuries occasioned by her tortious acts in his presence. The doctrine has been adopted in this country, with some limitations.³⁰ To constitute the coercion or constraint that will render the husband alone responsible, there are two essential elements: The presence of the husband, and a direction, command or threat that he

²⁷ State v. Houston, 29 S. C. 108, 6 S. E. 943.

²⁸ State v. Martini, 81 N. J. L. 685, 78 Atl. 12.

²⁹ State v. Erickson, 57 Or. 262, 110 Pac. 785, 111 Pac. 17.

³⁰ Cassin v. Delaney, 38 N. Y. 178; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772 (a case of assault and battery); McKeown v. Johnson, 1 McCord (S. C.), 578 (a case of trespass), and Curd v. Dodds, 6 Bush (Ky.), 681.

was capable of enforcing. The fact that the offense was committed in the husband's presence is held to be evidence of such direction, but *prima facie* evidence only. "His presence furnishes evidence and affords a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence."³¹ As to what will amount to a "presence" by the husband so as to raise the presumption of coercion, Justice Ames says: "But in order to establish the fact of his presence it does not seem to be necessary to show that the act was done literally in his sight. If the husband were near enough for the wife to be under his immediate influence and control, though not in the same room, it is sufficient."³² If he were on the premises, and near at hand, a momentary absence from the room, or a momentary turning of his back, might still leave her under his influence."³³ "The legal definition 'in company with' the husband should, however, receive a liberal interpretation so as to include all cases of constructive presence."³⁴ As it is the presumed constraint placed upon the wife by the presence of her husband that exempts her from liability, if it appear that the tort was committed out of the husband's presence, though by his direction, then she will be responsible with him; for, being away from him, he could not enforce his directions, he had not the capacity to coerce.³⁵ From these cases it results that to release the wife from liability for her torts it is necessary that the husband should have directed their commission, and should have, by his presence, actual or constructive, exerted such an influence over her as to compel obedience to that direction. The sole responsibility of the husband for torts committed by him jointly with his wife proceeds upon the same ground of coercion of the wife as already referred to,³⁶ where a joint

³¹ Cassin v. Delany, *supra*; Wagoner v. Bill, 19 Barb. (N. Y.) 321; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772, and City Council v. Van Roven, 2 McCord (S. C.), 465; Ferguson v. Brooks, 67 Me. 251.

³² Commonwealth v. Burk, 11 Gray (Mass.), 437; Commonwealth v. Munsey, 112 Mass. 287.

³³ Commonwealth v. Welch, 97 Mass. 593.

³⁴ Schouler, Dom. Relations, 104.

³⁵ Cassin v. Delany, *supra*; Marshall v. Oakes, *supra*.

³⁶ McKeown v. Johnson, 1 McCord (S. C.), 578.

trespass was committed,³⁷ a case of the withholding of real estate from a third person by the husband and wife;³⁸ or a joint trespass.³⁹ It is conceived that the same rules as to presumption of constraint apply in cases of joint torts as were laid down concerning the torts of the wife alone, committed in her husband's presence. The rule of the common law that, for all torts of the wife committed not in her husband's presence, nor by his direction, he must be sued as a codefendant with her, has been very generally adopted in this country.⁴⁰ The reason of the common-law rule is, that the unity of the marriage state rendered the wife incapable of being sued without her husband—and not that, in contemplation of law, he is guilty. His liability continues only so long as the marriage relation exists, and in case of his death, the action would survive against her.⁴¹

§ 91a (90). Synopsis of the preceding sections—Effect of married woman's acts—Statutes.—The law may therefore

³⁷ *Meegan v. Gunsollis*, 19 Mo. 417.

³⁸ *Dailey v. Houston*, 58 Mo. 361.

³⁹ *Sisco v. Cheeney*, *Wright* (Ohio), 9; *Park v. Hopkins*, 2 Bail. (S. C.) 411.

⁴⁰ For the slanderous words used by the wife he has been held jointly responsible in *McElfresh v. Kirken-dall*, 36 Iowa, 224; *Luse v. Oaks*, 36 Iowa, 562; *Sunman v. Brewin*, 52 Ind. 140; *Fowler v. Chichester*, 26 Ohio St. 9; for her libel, in *Tait v. Culbertson*, 57 Barb. (N. Y.) 9; for her assault and battery, *Coolidge v. Parris*, 8 Ohio St. 595; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; for her trespass, *McKeown v. Johnson*, 1 McCord (S. C.), 578; *Whitmore v. Delano*, 6 N. H. 543; and the recent case of *Ferguson v. Brooks*, 67 Me. 251; for her burning of a mill, *Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356. But in Massachusetts, the statute of 1871, chapter 312, provides that the husband must have aided, abetted, advised or otherwise encouraged the act, to render him liable for the torts

of his wife: *Austin v. Cox*, 118 Mass. 58. There is also a similar statutory provision in Illinois: *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578. Another departure from the general rule has been made in those states where it has been enacted that, as regards her separate property, the wife may sue and be sued alone. It is this: For injuries caused by the wife in the management and control of her separate property, she alone is responsible; *Baum v. Mullen*, 47 N. Y. 577; *Peak v. Lemon*, 1 Lans. (N. Y.) 295. In this latter case, an action for a conversion by the wife of a property claimed as her separate property, it is said: "That she is liable, and that her husband is not liable, and that it is not the validity but the nature of her claim which becomes the test of her responsibility and of his exemption." So, also, in *Maine: Ferguson v. Brooks*, 67 Me. 251.

⁴¹ *Kowing v. Manly*, 49 N. Y. 198, 10 Am. Rep. 346; *Sunman v. Brewin*, 52 Ind. 140.

be said to be: 1. That a wife is not liable for any criminal act (except, as is maintained by some authorities, treason, murder and some kinds of robbery), where the act is done under the actual coercion of the husband. 2. Such coercion is presumed from the husband's presence in the case of all minor felonies and misdemeanors. 3. The presumption does not arise in the case of the graver felonies. 4. Nor in cases where the wife is indicted for keeping a disorderly house (with the exceptions already noted). 5. The presumption of marital coercion is merely *prima facie* and may be rebutted. 6. A married woman who acts independently in the commission of a crime may be convicted as if she were a *feme sole*. 7. The presence of the husband, which will excuse the wife, need not be actual. 8. The effect of the married women's acts has not been to materially change or modify the rules of evidence or the legal presumptions applicable to married women or their acts in criminal proceedings. With the movement for granting further privileges to women, perhaps Sir J. F. Stephen's prophecy may yet be fulfilled:⁴² "Surely as matters now stand and have stood for a great length of time, married women ought, as regards the commission of crime, to stand exactly on the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on every occasion where it ought to be applied."⁴³ A very eminent legal writer has said that the net result of the married women's acts seems to be that the judges will be somewhat inclined to treat them as a sort of imperfect legislative recognition of the fact that the presumption of marital coercion has no adequate foundation as society is now constituted, and probably to carry still further the practice of evading the rule, which Sir J. F. Stephen, in the passage quoted above, very truly states to be the only reason why

⁴² Note to article 30, Digest of Criminal Law.

⁴³ See on this subject, Commonwealth v. Burk, 11 Gray (Mass.), 437; Commonwealth v. Wood, 97

Mass. 225; Commonwealth v. Gannon, 97 Mass. 547; Commonwealth v. Carroll, 124 Mass. 30; Quick v. Miller, 103 Pa. 67.

the existence of the rule is tolerated. Such a state of things is, it must be admitted, eminently unsatisfactory, and the matter seems to call very urgently for that legislative interference by which alone it can now be adjusted on a rational basis.⁴⁴

§ 92 (91). Same subject—Nature and limits of the presumption.—Inasmuch as the presumption is partly founded on the sentiment of wifely obedience and submission to the husband, so it may be rebutted by the equally quaint idea of self-assertion by the wife in his absence. Therefore, except he is present, she can derive no benefit from the inference of his coercion. But although the presumption does not arise, unless the tortious or criminal act is performed in the presence of the husband, it is not necessary, as we have shown, that he should be *literally present*; thus, if he is momentarily out of the room or otherwise out of her immediate presence, but under such circumstances that his influence over her may be supposed to continue, the presumption may still arise.⁴⁵ If the crime is commenced in the absence of the husband but completed in his presence, the presumption arises. If a wife, at the instigation and request of her husband, procures a revolver and takes it to him in jail, where he is confined, for the purpose of assisting him to escape, and he actively participates with her in conveying the revolver into the jail, it must be presumed that she acts under his direction and coercion, and she is entitled to acquittal of any charge brought against her for the commission of such act, unless such presumption is rebutted.⁴⁶ Some of the cases have carried the doctrine far

⁴⁴ The late A. C. Freeman, in monographic note to *Bibb v. State* (*supra*), 33 Am. St. Rep. 96.

⁴⁵ *Commonwealth v. Burk*, 11 Gray (Mass.), 437; *Commonwealth v. Munsey*, 112 Mass. 287.

⁴⁶ *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498, 62 S. W. 692. In *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 416, 19 S. W. 222, the wife by her own evidence exonerated her

husband of all complicity in the crime, and so did other testimony, and the court ruled that she was responsible for her own acts, and the presumption was rebutted. See, also, *Rex v. Knight*, 1 Car. & P. 116, a similar case; 1 Bishop on New Criminal Law, § 359; and monographic note to *Bibb v. State*, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88.

beyond the bounds of reason and have applied the presumption to shield the wife when she had actually engaged in crime in the *absence* of her husband, or under such circumstances that the idea of coercion or fear seemed absurd.⁴⁷ The rule came to prevail at common law at a time when the husband was the undoubted autocrat over the property and person of the wife. But the husband no longer has any such legal supremacy, and there is every reason for applying somewhat more cautiously this presumption, which in a different state of the law was highly favored. The presumption was *never conclusive*; and the modern decisions have proceeded on the theory that it may be easily rebutted. It will be seen by referring to the decisions cited that the circumstances of the case may, without independent evidence, *rebut the inference* of coercion; or it may be shown that the wife was the instigator or more active party, or that the husband, although present, was incapable of coercion, or that the wife was the stronger of the two.⁴⁸ It is error to exclude the testimony of the husband that the wife acted of her own motion and without coercion.⁴⁹ In an Arkansas case,⁵⁰ the court reduced to four very succinct rules the circumstances under which a married woman may commit a tort, and the different liabilities attached to each. The court says that the torts of a married woman may be committed under any of the following circumstances: 1. Where the husband is absent, and had no knowledge of the intended act; 2. Where the husband is absent, but where the tort is done under his direction and instigation; 3. Where the husband was present, but the wife acted of her own volition; and 4. Where the tort is committed in the company of the husband, and by his command or encourage-

⁴⁷ *Rex v. Knight*, 1 Car. & P. 116, and cases cited in the note to this case; *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160, 58 L. R. A. 941, 70 Pac. 21. See note, 92 Am. St. Rep. 167.

⁴⁸ *Marshall v. Oakes*, 51 Me. 308; *Wagener v. Bill*, 19 Barb. (N. Y.) 321; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772, and note; *City*

Council v. Van Roven, 2 McCord (S. C.), 465; *Ferguson v. Brooks*, 67 Me. 251; *Franklin's Appeal*, 115 Pa. 534, 2 Am. St. Rep. 583, 6 Atl. 70.

⁴⁹ *Cassin v. Delany*, 38 N. Y. 178; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772, and note.

⁵⁰ *Kosminsky v. Goldberg*, 44 Ark. 401.

ment. "In the first three cases, they are jointly liable, and the wife must be joined. She is really the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because the wife cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable."⁵¹

§ 93 (92). Presumption of legitimacy.—There is no presumption of the law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate.⁵² In his work on Evidence, Stephen thus states the modern English rule as to the presumption in favor of legitimacy: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown, either that his mother and her husband had no access to each other at any time when he could

⁵¹ In trover, for the unlawful conversion of a chattel, alleged to have been committed by the wife, both husband and wife may be joined, but the conversion must be alleged to have been for the benefit of the husband. It is erroneous to charge it to have been for their joint benefit: *Estill v. Fort*, 2 Dana (Ky.), 239; *Tobey v. Smith*, 15 Gray (Mass.), 535; *Knowing v. Manly*, 49 N. Y. 192-198, 10 Am. Rep. 346; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366. The conversion of property to use merely by the wife is to the use of her husband, and not of herself. The mere detention of property wrongfully by her is not her tort, but her husband's. This appears from the fact that the action of detinue, the gist of which was wrongful de-

tention, can be maintained against the husband only: *Shaw v. Hallihan*, 46 Vt. 389-393, 14 Am. Rep. 628.

⁵² *Strode v. McGowan*, 2 Bush (Ky.), 621; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 18 L. Ed. 950; *Gaines v. Hennen*, 24 How. (U. S.) 553, 16 L. Ed. 770; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, and note, 66 N. E. 256. On the general subject of this section, see note to *Weatherford v. Weatherford*, 56 Am. Dec. 206; *Wallace v. Wallace*, 126 Am. St. Rep. 261; *Goss v. Froman*, 8 L. R. A. 102; *Woodward v. Blue*, 10 L. R. A. 662; *Power v. Howie*, 6 Atl. 210; *Johnston v. Hazen*, 26 C. L. T. 317, 3 N. B. Eq. 147; *Robb v. Robb*, 20 Ont. Rep. 591.

have been begotten, regard being had both to the date of the birth and to the physical condition of the husband or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred."⁵³ This presumption is the application of a particular branch of the broader presumption in favor of innocence. *Odiosa et inhonesta non sunt in lege praesumenda*. At one time, if it appeared that the husband was *within the four seas* at any time during the pregnancy of the wife, the presumption in favor of legitimacy was *conclusive*.⁵⁴ This absurd rule could not long endure even in a system of jurisprudence which abounded in legal fictions, and after various attempted exceptions and classifications, all of which were illogical and unsatisfactory, the rule came to prevail in England substantially as stated by Stephen, leaving the question of legitimacy to be determined by the court or jury on the evidence presented as to the access or nonaccess of the husband.⁵⁵ In two Illinois

⁵³ Reynold's Steph. Ev., art. 98.

⁵⁴ Rex v. Alberton, 1 Ld. Raym. 395, 91 Eng. Reprint, 1163; Reg. v. Murrey, 1 Salk. 122, 91 Eng. Reprint, 115. But see King v. Luffe, 8 East, 193, 103 Eng. Reprint, 316.

⁵⁵ 2 Kent, Com. 211. For cases illustrating the various stages of the doctrine on this subject, see Reg. v. Murrey, 1 Salk. 122, 91 Eng. Reprint, 115; Rex v. Alberton, 1 Ld. Raym. 395; 91 Eng. Reprint, 1163; King v. Luffe, 8 East, 193, 103 Eng. Reprint, 316; Pendrell v. Pendrell, 2 Str. 925, 93 Eng. Reprint, 945. In Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Reprint, 457, it was said that this presumption would not be rebutted by circumstances which created only doubt and suspicion, but it would be wholly removed by showing that the husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication whatever with the mother; 3. Entirely absent at the period during which the

child must, in the course of nature, have been begotten; and 4. Present only during such circumstances as afforded clear and satisfactory proof that there was no sexual intercourse. And Shuler v. Bull, 13 Rep., N. S., 156, held that while the principle expressed in the maxim, *Pater est quem nuptiae demonstrant*, was entitled to great influence, yet the question of the paternity of a child born in wedlock was one of fact, to be determined upon competent evidence. The evidence, however, must be strong, distinct, clear, and satisfactory: Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Reprint, 457; Plowes v. Bossey, 2 Drew. & S. 145, 31 L. J. Ch. 681, 8 Jur., N. S., 352, 62 Eng. Reprint, 576; Vernon v. Vernon, 6 La. Ann. 243. The *onus probandi* lies entirely on the part of those who wish to show the illegitimacy: Plowes v. Bossey, *supra*. See, also, Head v. Head, 1 Sim. & St. 150, 57 Eng. Reprint, 61; Atchley v. Sprigg, 33 L. J. Ch.

cases,⁵⁶ the law is very clearly set out. A legitimate child being one born in legal wedlock or within competent time thereafter, the presumption of legitimacy arising from birth in wedlock is not overcome by proof of antenuptial conception. A child born during wedlock is presumed to be legitimate, though the husband and wife have been married but fifteen days, and she had been divorced from her former husband but twenty days, such divorce being based upon service of process by publication, and there being no evidence showing whether or not such husband was a resident of the state, or lived with his wife at or within the period of conception.⁵⁷ Whenever the child is born in lawful wed-

345. As to presumption of marriage, see § 87, *ante*. Shakespeare recognizes this rule:

"K. John:

Sirrah, your brother, is legitimate;
Your father's wife did after wedlock
bear him;

And, if she did play false, the fault
was hers;

Which fault lies on the hazard of all
husbands

That marry wives."

—*King John, Act 1, Scene 1.*

"Miranda:

Sir, are not you my father—

Prospero:

Thy mother was a piece of virtue, and
She said thou wast my daughter."

—*The Tempest, Act 1, Scene 2.*

56 Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256.

57 Zachmann v. Zachmann, *supra*; 1 Bl. Com. 446. The doctrine of choice of fathers and extra legitimacy, together with the origin of the period of the widow's mourning, are thus treated by Blackstone in the same volume, at page 457, Choice of Fathers: "But, if a man dies, and his widow soon after marries again, and a child is born within such a

time as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases. To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus* (within the year of mourning), a rule which obtained so early as the reign of Augustus, if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments." As a fact the laws of Ethelred and Canute contain the enactment, *Sit omnis vidua sine marito duodecim menses*. (Let every widow remain unmarried twelve months.) Stephen in a note to art. 98 says that he is not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six

lock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such intercourse did not take place at any time when by such intercourse the husband could be the father of the child.⁵⁸ To bastardize a child born in lawful wedlock, the most *clear and conclusive evidence* of nonaccess is required.⁵⁹ It is a familiar rule that issue born in wedlock, though begotten before, is presumptively legitimate.⁶⁰ Many of the states have incorporated the presumption in their codes, following that already dealt with—that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage—in the words, “That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.”⁶¹ In addition there is the conclusive presumption that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;⁶² and that the presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.⁶³ So a child born after an interlocutory decree in divorce and before final judgment would have the same rights as though no proceedings had been taken, independently of the protection afforded by statute to children of divorced persons.⁶⁴

months) must leave the regiment; the result was, and is, that widowhoods are usually very short.

⁵⁸ *Banbury v. Peerage*, 1 Sim. & St. 153, 57 Eng. Reprint, 62.

⁵⁹ *Steph. Ev.*, art. 98; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720; *In re Robb's Estate*, 37 S. C. 19, 16 S. E. 241; *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377.

⁶⁰ *Miller v. Anderson*, 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605; *Tioga Co. v. South Creek*, 75 Pa. 433;

State v. Herman, 13 Ired. (N. C.) 502; *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721. See, also, *Succession of Ledet*, 122 La. 200, 47 South. 506.

⁶¹ Cal. Code Civ. Proc., § 1963 (31).

⁶² Cal. Code Civ. Proc., § 1962 (5).

⁶³ Cal. Civ. Code, § 195; and see, also, *Estate of Campbell*, 12 Cal. App. 707, 108 Pac. 669, 676.

⁶⁴ *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320. “It is the final judgment that grants the divorce. The interlocutory judgment does not have

Where a father addressed a letter to his child as his son, *prima facie* his legitimate son was understood by the mode of address.⁶⁵ And where a man contracted a bigamous marriage and children were born of it, and after twenty-five years from the death of all the parties to the marriages the question of the legitimacy of the issue was raised, the court presumed the validity of the second marriage in favor of legitimacy, and the *onus* of proving the first marriage was in effect at the time of the second was thrown on the party attacking the second one.⁶⁶

§ 94 (93). Same—How Rebutted.—The presumption of legitimacy is so strong that it can only be overcome by proof that the husband is not the father of the child. Hence at once there was furnished for consideration the

that effect. It merely declares the right: that the party is 'entitled' to a divorce, a divorce to be afterward adjudged. By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the status of single persons and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and, in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the meantime the parties remain in the legal relation of husband and wife. This is in harmony with the decisions in *Deyoe v. Superior Court*, 140 Cal. 484, 98 Am. St. Rep. 73, 74 Pac. 28; *Grannis v. Superior Court*, 146 Cal. 250, 106 Am. St. Rep. 23, 79 Pac. 891, and *Periera v. Periera*, 156 Cal. 9, 134 Am. St. Rep. 107, 23 L. R. A., N. S., 880, 103 Pac. 488. There is nothing inconsistent with this in *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897. The question

here involved did not arise and was not discussed in that case. It follows from what we have said that, at the time of the death of the decedent, *Erminia P. Dargie* was his wife and that she is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance": *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320. California Civil Code, section 194, provides that all children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of the marriage.

⁶⁵ *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444.

⁶⁶ *In re Stanton*, 123 N. Y. Supp. 458. This case is to be noted, as it contains valuable discussion on the difference of the rulings of the New York courts (see *Matter of Hamilton*, 76 Hun. 208, 27 N. Y. Supp. 813) and those of Indiana and California: See *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; *Hunter v. Hunter*, 111 Cal. 261, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756.

question whether the nonaccess of the father was merely improbable or impossible. In England, unless the husband was shown to be beyond seas during all the period in which it was possible for the wife to become pregnant and be delivered of a child, or unless it could be shown beyond question that the husband had no power of procreation, this presumption was so absolute that the doctrine of *filiatio non potest probari* applied, and no proofs would be received to dispute the legitimacy of the child.⁶⁷ This doctrine has practically been adopted in the United States with the modification that if the child is born under such circumstances that render it impossible that the husband of its mother can be its father, then the child may be adjudged a bastard. So that before such child can be adjudged a bastard, the proof must be clear, certain and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child. The rule seems now well established that the nonaccess need not be shown beyond any possible doubt, but the presumption of legitimacy is so highly favored that the *proof of nonaccess should be clear and satisfactory*.⁶⁸ The question, therefore, to be presented

⁶⁷ Powell v. State, 84 Ohio St. 165, 95 N. E. 660.

⁶⁸ Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Reprint, 457. Some of the cases hold that the proof should be beyond a reasonable doubt: Watts v. Owens, 62 Wis. 512, 22 N. W. 720; Phillips v. Allen, 2 Allen (Mass.), 453; Plowes v. Bossey, 31 L. J. Ch. 681, 32 Eng. Reprint, 576; Atchley v. Sprigg, 33 L. J. Ch. 345; Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375; Denison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Sullivan v. Kelly, 3 Allen (Mass.), 148. If the husband had access to the wife, no evidence short of his absolute impotence would bastardize the issue: Commonwealth v. Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; and the same is true where

they live together: Legge v. Edmonds, 25 L. J. Ch. 125; Commonwealth v. Wentz, 1 Ashm. (Pa.) 269. Where a child's mother was an Indian, proof that the child was a colored child will not be sufficient to overcome the presumption of his legitimacy, as the color will be referred to that derived from his mother: Ill. Land & Loan Co. v. Bonner, 75 Ill. 315. If the jury are satisfied that intercourse took place between husband and wife at such times as, in the course of nature, to account for the birth of the child, the child must be taken to be his, although during the same period other men may have had intercourse with the mother: Wright v. Holdgate, 3 Car. & K. 158. The fact that they had access is not conclusive of the legitimacy: Reg. v. Mansfield, 1 Q. B. 444, 113 Eng. Re-

to the jury in a case of this character is not whether the mother of the child and her husband did or did not have sexual intercourse at or about the time the wife became pregnant, but whether, under the circumstances proven, such acts of intercourse were possible. In other words, such circumstances must be shown by the evidence as would render it impossible that the husband of the woman could be the father of her child.⁶⁹ And when access, that is, an opportunity for sexual intercourse, is shown, the presumption of legitimacy is very strong indeed,⁷⁰ though not con-

print, 1203; if the wife was notoriously living in adultery, a child born would be illegitimate, even though the husband had access: *Cope v. Cope*, 5 Car. & P. 604; and to the same effect is *Sibbet v. Ainsley*, 3 L. T., N. S., 583; although in *Morris v. Davies*, 5 Clarke & F. 163, 7 Eng. Reprint, 365, it was held that if access be proved, no inquiry could be made whether the husband or any other person was the parent. See, also, *Hargrave v. Hargrave*, 9 Beav. 552, 50 Eng. Reprint, 457. But in *Morris v. Davies*, it was said that the legitimacy of a child born during separation, where the husband lived within such a distance as to afford an opportunity of sexual intercourse, would be disproved, not only by evidence showing that he did not have sexual intercourse with her, but also by evidence of their acts and conduct, such as that the wife was living in adultery; that she declared that she never had such child; that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence; and that the wife's paramour aided in concealing the child, reared it, educated it as his own, and left it all his property by his will. If there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the hus-

band's: *Reg. v. Mansfield*, 1 Q. B. 444, 113 Eng. Reprint, 1203. Evidence of nonintercourse for more than a year, continued to within five months of the birth of a child, is sufficient to establish its illegitimacy: *Dean v. State*, 29 Ind. 483. If a husband is found to have gone beyond seas above two years before the birth of a child born to his wife, she remaining at home, the conclusion is irresistible that such child is a bastard: *Rex v. Maidstone*, 12 East, 550, 104 Eng. Reprint, 215.

⁶⁹ Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies or even the apparent justice of any particular case will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whims or purposes of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant. The proof must be such as to show the impossibility of access, and this evidence not only fails to prove that, but, on the contrary, it does show that access was a physical possibility at all material times: *Powell v. State*, *supra*.

⁷⁰ *Plowes v. Bossey*, 31 L. J. Ch. 681, 62 Eng. Reprint, 576; *Wright v.*

clusive, it still being a question for trial whether such intercourse has actually taken place.⁷¹ Proof that husband and wife slept together is said to afford an irresistible inference of sexual intercourse;⁷² and also that they resided in the same house, conversed with each other, ate at the same table and lodged in adjoining rooms with a door between them, and had ample opportunity for sexual intercourse if they chose to indulge therein.⁷³ But it is open to proof, notwithstanding the strong probabilities to the contrary, that there was not in fact sexual intercourse, although the parties may have lived in the same house. If, notwithstanding such fact, the evidence is satisfactory that no such intercourse took place, the presumption may be thus rebutted.⁷⁴ The presumption arises, *though the parties live apart* by mutual consent, though not when they are separated by the *divorce* of the court. They are then presumed to obey the judgment of the court.⁷⁵

Hicks, 15 Ga. 160, 60 Am. Dec. 687; Morris v. Davies, 5 Clarke & F. 163, 7 Eng. Reprint, 365; Cope v. Cope, 5 Car. & P. 604; Bury v. Phillpot, 2 Mylne & K. 349, 39 Eng. Reprint, 977; Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375. Where access is either expressly or impliedly admitted, proof of adulterous intercourse is ordinarily inadmissible: Goss v. Froman, 89 Ky. 318, 8 L. R. A. 102, 12 S. W. 387.

⁷¹ Reg. v. Inhabitants of Mansfield, 1 Q. B. 444, 113 Eng. Reprint, 1203; Cope v. Cope, 5 Car. & P. 604; Commonwealth v. Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; Phillips v. Allen, 2 Allen (Mass.), 453; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644. The following language illustrates the strength of the presumption where access is shown: "If it were proved that the wife slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legiti-

mate": Sir John Leach in Bury v. Phillpot, 2 Mylne & K. 349, 39 Eng. Reprint, 977.

⁷² Legge v. Edmonds, 25 L. J. Ch. 125.

⁷³ Shuman v. Shuman, 83 Wis. 250, 53 N. W. 455.

⁷⁴ Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687, where the husband on his wedding night discovered his wife was with child and returned her to her parents the next morning, she having told him her stepfather had seduced her; State v. Pettaway, 3 Hawks (10 N. C.), 623; Rex v. Inhabitants of Mansfield, 1 Q. B. 444; Cope v. Cope, 5 Car. & P. 604; Commonwealth v. Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449. Compare Shuman v. Shuman, 83 Wis. 250, 53 N. W. 455. See, also, notes to Goss v. Froman, 8 L. R. A. 102, and Woodward v. Blue, 10 L. R. A. 662.

⁷⁵ St. George v. St. Margaret, 1 Salk. 123, 91 Eng. Reprint, 115; Sidney v. Sidney, 3 P. Wms. 275, 21 Eng. Reprint, 1060; Hemmenway v. Towner, 1 Allen (Mass.), 209.

§ 95 (94). Same—Conclusive generally if sexual intercourse between husband and wife is shown.—If such sexual intercourse is shown between the husband and wife at a time when by the laws of nature the husband might be the father of the child, the presumption is conclusive in favor of legitimacy. Sexual intercourse is to be presumed when personal access is not disproved, unless such presumption is rebutted by satisfactory evidence to the contrary; and where sexual intercourse is presumed, or proved, the husband must be taken to be the father of the child, unless there was a physical or natural impossibility that such intercourse should have produced such child. Although actual adultery with other persons is established, at or about the commencement of the usual period of gestation, yet if access by the husband has taken place, so that by the laws of nature he may be the father of the child, it must be presumed to be his, and not the child of the adulterer. Even though the wife at the time might have been living in adultery with another, her sexual intercourse with others cannot, under such circumstances, be given in evidence.⁷⁶

§ 95a (94). Same — Impotence.—The only evidence which can in such a case rebut the presumption is that of the impotency of the husband.⁷⁷ The burden of proof of such fact is upon the one asserting it.⁷⁸ Impotency, if shown on the part of the husband, has always been considered sufficient to establish the illegitimacy of the child; “it is in some cases a fact capable of demonstration, and if satisfactorily established, is the most certain and clearest proof that the husband is not the father of the child”;⁷⁹ and

⁷⁶ *Morris v. Davies*, 5 Clarke & F. 163, 7 Eng. Reprint, 365; *Cope v. Cope*, 5 Car. & P. 604; *Hemmenway v. Towner*, 1 Allen (Mass.), 209; *Cross v. Cross*, 3 Paige Ch. (N. Y.) 130, 23 Am. Dec. 778. See *Cannon v. Cannon*, 7 Humph. (Tenn.) 410, an exceptional case holding contrary view; and see, also, *Herring v. Goodson*, 43 Miss. 392.

⁷⁷ *Commonwealth v. Shepherd*, 6

Binn. (Pa.) 283, 6 Am. Dec. 449; *Legge v. Edmonds*, 25 L. J. Ch. 125. Proof may be given that the husband was impotent or absent when the conception took place: 1 Bish. Marr. Div. & Sep., § 1182.

⁷⁸ *State v. Broadway*, 69 N. C. 411; *Gardner v. State*, 81 Ga. 144, 7 S. E. 144.

⁷⁹ *Nicholas' Adulterine Bastardy*, 10.

it is no answer to say that he has been the father of a child at an earlier period of his life.⁸⁰ The presumption of legitimacy may be wholly removed by showing by proper and sufficient evidence that the husband was incompetent,⁸¹ but where such physical incapacity is satisfactorily made out according to the opinions of medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child, because if the wife were of irreproachable character, it would go far to modify the opinion as to the husband's incapacity.⁸² In an old case,⁸³ where a man was divorced from his wife on the ground of his perpetual impotence, and then married another woman by whom he had children, the issue were held to be his, because, as was said, a man may be *habilis et inhabilis diversis temporibus*. The impotence of the husband must be clearly and fully established;⁸⁴ and it has been held that where access of the husband to the wife has been shown, nothing short of his absolute impotence can bastardize the issue.⁸⁵ One important exception to the rule above stated is where the child in the ordinary course of nature could not be the offspring of the husband and wife, as in the case of a mulatto claiming to be the legitimate son of a white woman whose husband was a white man and of the white race. The inference is excluded that the charge of illegitimacy rests either upon the impotency of the husband or upon the impossibility of his access to the wife during the period when she became pregnant. If the rule above stated were to prevail, the particular case is not one in which the law permits the presumption of legitimacy to be disputed, and the mulatto would have to be treated as the son of his

⁸⁰ *State v. Broadway*, 69 N. C. 411.

⁸¹ *Hargrave v. Hargrave*, 9 Beav. 552, 50 Eng. Reprint, 457.

⁸² *Leggee v. Edmunds*, 25 L. J. Ch., N. S., 125.

⁸³ *Bury's Case*, 5 Co. 98b.

⁸⁴ *Commonwealth v. Wentz*, 1 Ashm. 269.

⁸⁵ *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449;

and see *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687, and cases cited in the note thereto (p. 698), showing that the jury are not limited in their inquiries to the physical impotence of the husband, but that they must act upon any evidence that will show the absolute impossibility of the husband's being the father of the child, from whatever cause that impossibility might arise.

mother's husband. The modern authorities sustain the proposition that the presumption of legitimacy from the birth of a child during marriage may be rebutted by evidence which clearly and conclusively shows that the procreation by the husband was impossible; and that it is competent to show that, according to the course of nature, the husband could not be the father of the child. "We are satisfied that it is competent for the complainant to show by proof that it is contrary to the laws of nature for both the parents of a mulatto to be persons of the white race. It may be that the court would be justified in recognizing such impossibility as a matter of common knowledge. No harm could be done, however, in receiving the testimony of scientific experts upon this inquiry."⁸⁶

§ 96 (95). Same—Relevant facts where sexual intercourse between husband and wife is not shown.—It follows logically that where sexual intercourse between the husband and wife is not shown, and it is sought to rebut the presumption that the child born in wedlock is legitimate, a great variety of circumstances may be relevant to the rebuttal; not only to show that the husband had not sexual intercourse with her, but also by evidence of their conduct, such as that the wife was living in adultery; that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will.⁸⁷ The doctrine as laid down in the Code Napoleon, title 7, section 32, respecting the evidence of filiation, is equally the doctrine of the common law: that "the enjoyment of this condition is established by a satisfactory combination of facts, indicat-

⁸⁶ Bullock v. Knox, 96 Ala. 195, 11 South. 339. See, also, Illinois Loan Co. v. Bonner, 75 Ill. 315, in which the fact that the son was a colored man, his mother being an Indian, did not overcome the presumption, as the

color was referable to his mother, though the alleged father was of the white race.

⁸⁷ Morris v. Davies, 5 Clarke & F. 163, 7 Eng. Reprint, 365.

ing the connection of parent and child between an individual and the family to which he claims to belong." The principal of these facts are said to be, that the individual has always borne the name of his father, to whom he claims to belong; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society, and that he has been acknowledged as such by the family.⁸⁸ The absence of any of these conditions would therefore be relevant in considering the conduct of the parties. It must not be lost sight of that while the evidence to repel the presumption of legitimacy must be clear and positive, nevertheless it has been held that slighter proof repels presumption of legitimacy arising from marriage in case of antenuptial conception than in case of post-nuptial conception; for in the former case marriage only, and not the presumed marital sexual intercourse, creates the presumption. The court should not take from the jury the question of legitimacy of a child, born in wedlock but conceived out of wedlock, where there is evidence that neither the husband nor his family recognized the legitimacy of the child, but declared its illegitimacy and treated it as illegitimate; that the child resembled the reputed father; that the mother, by her conduct, confessed the illegitimacy of the child; that the husband and wife lived together for five years afterward, and during that time she never had another child, but afterward bore children to a second husband.⁸⁹ This view, however, of slighter evidence

⁸⁸ *Weatherford v. Weatherford*, 20 Ala. 548, 56 Am. Dec. 206. See, also, valuable note on affiliation appended thereto, p. 210.

⁸⁹ *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687. See, also, *Wright v. Hicks*, 12 Ga. 155, 56 Am. Dec. 451, and note thereon; *Stegall v. Stegall*, 2 Brock. (U. S.) 256, Fed. Cas. No. 13,351. In this case the opinion of Marshall, C. J., has been cited in many cases which follows the case of *Pendrell v. Pendrell*, 2 Strange, 925, 93 Eng. Reprint, 945, which really

settled the law on the subject. See, also, *Dennison v. Page*, 29 Pa. 422, 72 Am. Dec. 644. The syllabus of the *Stegall* case says: "If a man marries a woman in such an advanced state of pregnancy that the situation of his wife must have been known to him, it must be considered as a recognition of the child, afterwards born, as his own; any conduct of the husband after the birth, indicating a belief that the child is his, is decisive. But where the marriage takes place where the pregnancy is prob-

in antenuptial conceptions has not been generally accepted, and in a leading case has been indirectly challenged. The law, as well supported by authority, is that antenuptial conception does not weaken the presumption of legitimacy arising from post-nuptial birth. This presumption can only be removed by proof of nonaccess at any time when it was possible for the child to have been begotten.⁹⁰ The adultery of the mother is always relevant,⁹¹ and, as we have said, it is proper on the issue to show that the wife had concealed the birth of the child from her former husband and that the husband had acted as if no such child had been born.⁹² Under the rule already stated, it would, of course, be sufficient to establish the illegitimacy to prove that the wife was living in adultery when the child was begotten, and that the husband was residing at such a place that access was impossible.⁹³

§ 96a (95). Same — Relevancy of resemblances. — The state of the law with regard to admitting evidence of resemblance (or its absence) of alleged parent and child is exceedingly unsatisfactory both here and in England. There is no good reason for this, but like many other similar cases, the existing conflict is due to inattention rather than purpose. In any case the question should be decided one way or the other, and some authorities prompt the recognition of two rules of guidance: 1. That in all such cases the parties between whom the alleged resemblance exists may be produced to the jury. 2. That all evidence *aliunde* should be excluded. Comparison by photographs appears to be just

ably unknown; where the acquaintance between the parties most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterward born; where the common opinion of the neighborhood assigns the child to another man; where the boy grows up, not in the house of the husband of the woman, nor looking on him as a father, nor being considered as a son, and the reputation of the woman is not good; these

are all circumstances which go strongly to repel the presumption of legitimacy."

⁹⁰ *Dennison v. Page*, *supra*, and cases cited therein.

⁹¹ *Cope v. Cope*, 5 Car. & P. 604; *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687.

⁹² *Morris v. Davies*, *supra*.

⁹³ *The Barony of Saye v. Sele*, 1 H. L. Cas. 507, 9 Eng. Reprint, 857; *Gurney v. Gurney*, 32 L. J. Ch. 456.

as open to objection as other evidence of resemblance, although it has been allowed.⁹⁴ Nothing is more notional, in the great majority of cases, than a fancied resemblance. What is taken as a resemblance by one is not perceived by another, with equal knowledge of the parties between whom the resemblance is supposed to exist. Where the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered. But to allow third persons to testify as to their notions of the resemblance supposed to exist between parties would be allowing that to be given as evidence upon which no rational conclusion could be based, but which might readily serve to mislead the jury.⁹⁵ In a case from Georgia,⁹⁶ evidence of the resemblance was not admitted, but the opinion was

⁹⁴ Shorten v. Judd, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337.

⁹⁵ Jones v. Jones, 45 Md. 144. In the celebrated Douglas cause, decided by the house of lords in 1769, Lord Mansfield said that he had always considered likeness as an argument of a child's being the son of a parent. In other cases, if there should be a likeness of features, there might be a discriminancy of voice, a difference in gesture, the smile, and various other things; whereas, a family likeness ran generally through all these; for in everything there was a resemblance, as in features, size, attitude and action. He accordingly allowed weight to the proved resemblance of the appellant in that case and his brother to Sir John Stewart and Lady Jane Douglas, and to their dissimilitude to the other persons whose children they were alleged to be. And the same sort of evidence was admitted by Mr. Justice Heath, in the case of Day v. Day, at the Huntingdon Ass., in 1797, upon the trial of an ejectment, where the question was one of *partus suppositio*.

These cases are stated by Hubback, in his work on Evidence of Succession, 384; but the author states them with strict limitation, and with apparent doubt whether such evidence be safe and reliable. And as we do not find the principle of these cases stated in other works on the law of evidence of approved authority, we think it fair to conclude that the cases mentioned have not been regarded as establishing a rule upon the subject. Indeed, Mr. Justice Heath, in the case of Day v. Day, just referred to, admitted that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence. See, also, Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; People v. Carney, 29 Hun (N. Y.), 47; Shailer v. Bullock, 78 Conn. 65, 112 Am. St. Rep. 87, 61 Atl. 65; Higley v. Bostick, 79 Conn. 97, 63 Atl. 786 (exhibition of child in bastardy cases).

⁹⁶ McCalman v. State, 121 Ga. 491, 49 S. E. 609, in which the cases are well collected.

dissented from by one of the justices. In a Wisconsin case,⁹⁷ it was ruled that, in bastardy cases, the child may not be exhibited to the jury to show its resemblance to the defendant, nor may counsel draw attention to or comment on the resemblance. Mr. Justice Lyon, in a previous case in the same state,⁹⁸ said: "To allow jurors to make up their verdict on their knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all the evidence is before it, and there is none whatever to support the judgment." This reasoning, said the court in the later case, clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. "If the child itself, when presented to the jury for inspection, is or may be evidence tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fails to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted."⁹⁹ While, on the other hand, Mr. Justice Candler¹⁰⁰ says: "Evidence that a bastard child resembles in appearance the person charged to be its father is admissible where the points of resemblance are pointed out, and should be submitted to the jury for what it is worth. Often it may be of little probative value, but that is a matter for the jury, and not the court. It is a circumstance, and I am at a loss to understand in what respect it differs from any other cir-

⁹⁷ Hanawalt v. State, 64 Wis. 84,
54 Am. Rep. 588, 24 N. W. 489.

⁹⁸ Washburn v. M. & L. W. R.
Co., 59 Wis. 364, 18 N. W. 328.

⁹⁹ Hanawalt v. State, *supra*.

¹⁰⁰ McCalman v. State, *supra*.

cumstantial evidence. A man may have strongly marked physical characteristics, and the fact that a child of which he is alleged to be the father has those characteristics may be very high evidence of his guilt of the charge of bastardy. At all events, courts cannot say, as a matter of law, that it proves nothing. A jury has as much right to say whether a red-headed, blue-eyed, hook-nosed baby is the child of a man with those same features as it has to establish the identity of a man charged with murder by means of his physical characteristics."¹ From these cases, and from the fact that it would be difficult to prevent a jury seeing the persons said to resemble each other, and that it has been held that it is not error for the court to permit a complaining witness to hold a baby in her arms while giving evidence, so long as there was no attempt to offer the baby in evidence, or to exhibit it to the jury,² sufficient reason exists for a uniformity of law as suggested, care being taken that the jury is admonished as to the degree of caution to be exercised in drawing conclusions from their observation.³

¹ See 1 Greenl. on Ev., § 145. The learned author of "Beck's Medical Jurisprudence" says: "It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is, however, a circumstance connected with this which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a

different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro." In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father: *Warlick v. White*, 76 N. C. 175. See, also, *Esch v. Graue*, 72 Neb. 719, 101 N. W. 978; *Land v. State*, 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90. See, also, notes to *State v. Danforth*, 6 Ann. Cas. 560; *Rex v. Hughes*, 19 Ann. Cas. 536.

² *Johnson v. State*, 133 Wis. 453, 113 N. W. 674. See, also, *Busse v. State*, 129 Wis. 171, 108 N. W. 64.

³ Shakespeare furnishes a useful illustration in the trial of the rights of the two Faulconbridges to their father's estates, the younger alleging that the elder brother is the illegiti-

§ 97 (96). The husband or wife not allowed to deny sexual intercourse.—That the lips of both husband and wife should be sealed on the subject of their sexual intercourse, that the sacredness of that part of the marriage relations should not be violated by either, was, after some slight struggle for a conflict, universally sustained. It is founded upon that policy of the law that forbids either husband or wife testifying to occurrences between them during marriage; also upon its supreme regard for those privileges of the married state that all men instinctively withhold from the public knowledge. If the question of legitimacy were open to such attack, to be sustained or defeated by a mere preponderance of evidence, based largely and most frequently upon circumstances alone, the right of inheritance, the integrity of blood, the pride of ancestry, and its just sense of honor, all would depend upon the most dubious of titles. From the very nature of the case, positive evidence in support of the legitimacy must be the most difficult to be adduced. The law does not allow its inquiries to invade the privacy of the connubial couch for any such purpose.⁴ It is well settled on the grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to chil-

mate son of Lady Faulconbridge and Richard Coeur-de-Lion.

"Bastard:

But that I am as well begot, my liege,

(Fair fall the bones that took the pains for me!)

Compare our faces, and be judge yourself.

If old Sir Robert did beget us both, And were our father, and this son like him;—

O, old Sir Robert, father, on my knee

I give Heaven thanks I was not like to thee.

Elinor:

He hath a trick of Coeur-de-Lion's face;

The accent of his tongue affecteth him:

Do you not read some tokens of my son

In the large composition of this man? •

• • • •

Bastard:

Sir Robert could do well; marry—to confess—

Could he get me? Sir Robert could not do it;

We know his handiwork: Therefore, good mother,

To whom am I beholden for these limbs?

Sir Robert never help to make this leg."

—*King John, Act 1 Scene 1.*

⁴ *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036.

dren born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them; nor are the *declarations* of such husband or wife competent as bearing on the question.⁵ The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy; for example, it was held incompetent to ask the husband, for the purpose of proving nonaccess, whether at a given time he did not live a hundred miles

⁵ In *re Mills' Estate*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91; *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036; *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498; *Abington v. Duxbury*, 105 Mass. 287; *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242, and note thereon; *Rhyne v. Hoffman*, 59 N. C. 335; *Boykin v. Boykin*, 70 N. C. 262, 16 Am. Rep. 776; *Kelley v. Proctor*, 41 N. H. 139; *Chamberlain v. People*, 23 N. Y. 88, 80 Am. Dec. 255; *Tioga County v. South Creek Township*, 75 Pa. 436; *Shuman v. Shuman*, 84 Wis. 250, 53 N. W. 455; *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Reprint, 1257; *Reynold's Stephen on Ev.*, art. 98, and cases cited *post*. Many reasons have been given for this rule. For instance, in *Tioga Co. v. South Creek Township*, 75 Pa. 433, it is said that prominent among them is the idea that the admission of testimony of nonaccess would be unseemly and scandalous, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. "That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence

the rule of law which forbids it." To the same effect are *King v. Inhabitants of Sourton*, 5 Ad. & El. 180, 111 Eng. Reprint, 1134; *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Reprint, 1257; *Anon. v. Anon.*, 22 Beav. 481, 52 Eng. Reprint, 1193; *Anon. v. Anon.*, 23 Beav. 273, 53 Eng. Reprint, 107; *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Cope v. Cope*, 5 Car. & P. 604; *S. C.*, 1 Moo. & R. 269; *Page v. Denison*, 1 Grant Cas. (Pa.) 377; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Rex v. Rook*, 1 Wils. (K. B.) 340, 95 Eng. Reprint, 650; and *Corson v. Corson*, 44 N. H. 587, where it is held that this rule is well established, independent of any question of interest, upon the broad ground that it is against public policy that either husband or wife should be allowed to prove nonaccess, and thus bastardize their issue. And this rule is not changed by a statute removing the incompetency of a witness to testify on account of interest, and which allows parties to testify in their own behalf: *Boykin v. Boykin*, 70 N. C. 262, 16 Am. Rep. 776. In *Anon. v. Anon.*, *supra*, the court allowed the wife to be asked, on cross-examination, when she first became acquainted with her husband, and she answering about twelve months before her marriage, the subject was not allowed to be further pursued.

away from his wife, and whether at that time he was not cohabiting with another person. And the mother of a child born in wedlock, though begotten before, is incompetent to prove that the child was not begotten by the man who became her husband before its birth.⁶ It has been questioned whether the rule applies in cases other than those in which the question of legitimacy only is involved, but an examination of the authorities discloses that it is general.⁷ Testimony of either party even *tending to show nonintercourse*, or of any fact from which nonaccess may be inferred, or of any collateral facts connected with the main fact, should be scrupulously excluded, and if the illegitimacy is to be proved, it must be proved by other testimony.⁸

⁶ *Rex v. Sourton*, 5 Adol. & El. 180, 111 Eng. Reprint, 1134; *Denison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *People v. Overseers*, 15 Barb. (N. Y.) 286; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; *State v. Pettaway*, 3 Hawks (N. C.), 623; *Cope v. Cope*, 5 Car. & P. 604; *Wallace v. Wallace*, 137 Iowa, 37, 126 Am. St. Rep. 253, 15 Ann. Cas. 761, and note, 14 L. R. A., N. S., 544, and note, 114 N. W. 527.

⁷ *Wallace v. Wallace*, *supra*. In *Parker v. Way*, 15 N. H. 45, such evidence was held to be inadmissible in an action on a promissory note; in *Tioga County v. South Creek Tp.*, 75 Pa. 433, to determine the settlement of a pauper; in *State v. Wilson*, 32 N. C. 131, in bastardy proceeding; in *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449, an indictment for fornication resulting in the birth of a bastard; in *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242, an action for seduction; in *Simon v. State*, 31 Tex. Cr. 186, 37 Am. St. Rep. 802, 20 S. W. 399, 716, an indictment for incest; in *Egbert v. Greenwalt*, *supra*, an action for criminal conversation; in *Tate v. Penne*, 7 Mart., N. S.

(La.), 548, suit for the possession of slaves; in *Cross v. Cross*, 3 Paige (N. Y.), 139, 23 Am. Dec. 778, passing on the custody of children in a suit for divorce; in *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255, an indictment for perjury committed in a suit for divorce on the ground of adultery. In *Corson v. Corson*, 44 N. H. 587, such evidence was held not to be admissible in a suit for divorce on the ground of adultery.

⁸ *Mink v. State*, 60 Wis. 583, 50 Am. Rep. 386, 19 N. W. 445; *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455; *Clapp v. Clapp*, 97 Mass. 531, an action for divorce, adultery charged. *As to the wife*: The wife it seems, is never competent for the purpose of proving nonaccess to her husband, and thus bastardizing her child: *State v. Pettaway*, 3 Hawks (N. C.), 623; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; *Cross v. Cross*, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; *Legge v. Edmonds*, 25 L. J. Ch., N. S., 125; *Queen v. Inhabitants of Mansfield*, 1 Q. B. 444, 113 Eng. Reprint, 1203; *Commonwealth v. Stricker*, 1 Browne (Pa.), p. xlvii; *Parker v. Way*, 15 N. H. 45; *People v. Overseers of Ontario*, 15 Barb. (N. Y.) 286. And

§ 97a (96). **Same—Other illustrations.**—The rule rests not only on the ground that it tends to prevent family dissension, but on broad grounds of *public policy*; hence it applies when at the time of the examination of the husband or wife, the other spouse is dead.⁹ Nor is the rule affected by the provisions of the codes enlarging the competency of

the testimony of the wife tending to show such fact, or any other fact from which nonaccess could be inferred of any collateral fact connected with the main one, is to be most scrupulously kept out of the case. Such nonaccess and illegitimacy must be clearly proved by other evidence: *Mink v. State*, 60 Wis. 585, 50 Am. Rep. 386, 19 N. W. 445, citing *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644. Nor is evidence of expressions of feeling of the wife toward the husband admissible: *Wright v. Holdgate*, 3 Car. & K. 158. Neither is she competent, even though her husband is dead at the time she is called as a witness: *King v. Kea*, 11 East, 132, 103 Eng. Reprint, 954. And in *Eloi v. Mader*, 1 Rob. (La.) 581, 38 Am. Dec. 192, it is held that the legitimacy of a child born in wedlock cannot be contested, either by the mother or her heirs, and only the putative father or his heirs may in certain cases contest the legitimacy. The child is not allowed to aver that he was the result of an adulterous intercourse on the part of the mother. *As to the husband*: The husband is not competent for the purpose of proving nonaccess: *Corson v. Corson*, 44 N. H. 587; *Hemmenway v. Towner*, 1 Allen (Mass.), 209; *King v. Inhabitants of Sourton*, 5 Ad. & El. 180, 111 Eng. Reprint, 1134. Nor is he competent to prove any collateral fact which would tend to show that he had opportunities of access: *Wright v. Holdgate*, 3 Car. & K. 158. So even where the declar-

ations of the father are admissible, they are not sufficient to bastardize the issue of the marriage: *Vernon v. Vernon's Heirs*, 6 La. Ann. 242; notwithstanding the child was born only three months after the marriage, and a separation between him and his wife took place soon after by mutual consent: *Bowles v. Bingham*, 2 Munf. (Va.) 442, 5 Am. Dec. 497. Where nonaccess has been established *aliunde*, the declarations of the wife are admissible to prove the paternity of the child: *Legge v. Edmonds*, 25 L. J. Ch., N. S., 125; and her declarations of her own guilt and misconduct, in connection with other satisfactory proof, are admissible to establish the fact of adultery: *Cross v. Cross*, 3 Paige Ch. (N. Y.) 23 Am. Dec. 778; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449. This sometimes arises from the necessity of the case: *People v. Overseers*, 15 Barb. (N. Y.) 286; *State v. Pettaway*, 3 Hawks (N. C.), 623; after nonaccess is proved by other evidence: *Parker v. Way*, 15 N. H. 45; and under the English statute of 32 and 33 Vict., c. 68, § 3, enabling husband and wife to give evidence in any proceeding instituted in consequence of adultery, their declarations as to nonaccess must be corroborated by other evidence in order to bastardize the child: *In re Rideout's Trusts*, L. R. 10 Eq. 41. See § 733 et seq., *post*.

⁹ *Rex v. Kea*, 11 East, 132, 103 Eng. Reprint, 954.

the witnesses;¹⁰ nor does it depend upon the form of action or the parties; on the contrary, it obtains *whatever the form of legal proceedings*, or whoever may be the parties.¹¹ But the rule does not prevent one acknowledged or proved to be the parent of the child whose legitimacy is in question from testifying that he or she was *not married* before the birth of the child.¹² Declarations of a deceased mother that her child was born before marriage, and corroborating statements made by her touching the circumstances and history of her life, are admissible in evidence to prove the illegitimacy of the child. This rule is, of course, limited to cases of children not born in wedlock. If the mother were alive, she would have been competent, in the trial of a case involving her daughter's legitimacy, to testify to the illegitimacy, by testifying that she, the mother, was never lawfully married.¹³ While the rule prevents the wife from testifying that she has not had intercourse with her husband, it does not prevent the wife from testifying that another person than her husband has had, or has not had, connection with her.¹⁴ The rule as to the inability of either spouse to deny intercourse is rigid on the grounds we have stated. Some little doubt has been thrown upon it by the utterance of the court in a Kentucky case:¹⁵ "Where the husband and wife have opportunities of access, there arises a very strong presumption that they did have it; but this presumption

¹⁰ *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *In re Mills' Estate*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91.

¹¹ *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255. See note, *supra*.

¹² *Hadock v. Boston & Maine Ry. Co.*, 3 Allen (Mass.), 298, 81 Am. Dec. 656.

¹³ *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Standen v. Edwards*, 1 Ves. Jr. 133, 30 Eng. Reprint, 266; *King v. Bramley*, 6 Term Rep. 330, 101 Eng. Reprint, 579. In this last case it was said by Lord Kenyon that parents may be called as witnesses to

prove their children illegitimate as well as to prove them legitimate. The remark is confined to children not born in wedlock.

¹⁴ *Rex v. Luffe*, 8 East, 193, 103 Eng. Reprint, 316; *Rex v. Rook*, 1 Wils. (K. B.) 340, 95 Eng. Reprint, 651; *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567, and note, 73 N. W. 242. This is often illustrated in bastardy proceedings.

¹⁵ *Goss v. Froman*, 89 Ky. 318, 8 L. R. A. 102, 12 S. W. 387, to which is appended a note on the presumption of legitimacy of children born in wedlock, dealing with the whole subject at generous length.

may be overcome by clear proof to the contrary, which may consist of proof that the husband was incompetent to have sexual intercourse, or from some cause he had declined to have sexual intercourse with his wife, or she with him. If such proof of conduct, declarations, etc., were not admitted as proof, it would be almost impossible to prove that the husband and wife had declined to have sexual intercourse with each other." An examination of this *dictum* discloses that while it lays down the law accurately, it abstains from saying that the evidence can be furnished by the testimony of either husband or wife, and the rule must continue that on the question of the legitimacy of their issue, whatever evidence of nonaccess or impotence may be relevant from other sources, it cannot come from either the husband or the wife, in the absence of express statutory provision on the subject.¹⁶ It appears, however, that once the nonaccess is established, evidence by the mother as to the paternity of her children is competent.¹⁷ And there can be no good reason for excluding the testimony once the impotence of the husband is established.¹⁸

§ 98 (97). Presumptions as to infants—Capacity to commit crime—Consent to sexual intercourse and marriage.—The outcome of the observations of the habits and customs of mankind, from which have sprung so many of our presumptions, would have been incomplete if it had not included in its range the privileges and obligations of those of tender years; and consequently we find many well-known and established presumptions growing out of the law reg-

¹⁶ Although it was decided in *Cuppy v. State*, 24 Ind. 389, that the testimony of a married woman was admissible in a bastardy proceeding to prove nonaccess by her husband, that was in pursuance of a special provision that in such case the mother of the child was a competent witness.

¹⁷ In *re Gird's Estate*, 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499.

¹⁸ The English case of *Murray v. Milner*, L. R. 12 Ch. D. 845, has been

sometimes erroneously cited to support the proposition that either parent is quite competent to testify that a particular child born during coverture is in fact illegitimate as to testify that he or she is legitimate. It is not so. The case in question deals with the admissibility of the declaration of a deceased father as evidence of the illegitimacy of his child, the question in dispute being whether he and the mother were ever married.

ulating the rights and liabilities of infants. The well-settled rule of the common law was, that an infant under the age of seven was conclusively presumed to be incapable of committing a crime. This changed to a *prima facie* presumption of incapability between the ages of seven and fourteen, while above fourteen no presumption at all existed in his favor. The fixing of these ages was certainly arbitrary, and perhaps the only real value of the distinction was¹⁹ to ascertain the party upon whom the proof of legal capacity lies. These ages of capacity are in some states changed by statute.²⁰ The rule that an infant under the age of seven cannot be guilty of a crime was laid down by the old authorities, and has been continued to the present day.²¹ Thus a child two years old cannot be a vagrant;²² nor can an infant one or two years old be made criminally answerable for a nuisance erected upon its lands;²³ and a plea of felony is no answer to an action for false imprisonment brought for the arrest of an infant under the age of seven years.²⁴ This doctrine, it seems to us, is not by any means satisfactory. While a presumption of incapability should undoubtedly exist in the infant's favor, varying in strength with age, this presumption should not be conclusive; for an infant under the age of seven may have sufficient intelligence to comprehend the nature and consequence of his act, and on proof of this fact, he should be made to suffer accordingly. Between the ages of seven and fourteen an infant is likewise deemed incapable of committing a crime, but this presumption is only *prima facie*, and consequently evidence of capacity may be given, and where it appears that a child within these ages is *capax doli*, he may be punished.²⁵ This presumption

¹⁹ *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592.

²⁰ *Wusnig v. State*, 33 Tex. 651; *State v. Barton*, 71 Mo. 288; *State v. Adams*, 76 Mo. 355.

²¹ 1 Hale P. C. 27; 1 Hawk. P. C. 2; Dalt. Just., c. 147; 4 Bl. Com. 23; 1 Archb. Crim. Pl., c. 1; 1 Russell on Crimes, 1; Broom's Legal Maxims, 8th Am. ed., 316; 1 Whart. Crim.

L., § 67; Whart. Crim. Ev., § 801; 1 Bishop, Crim. L., § 368.

²² *Rex v. Inhabitants of King's Langley*, 1 Str. 631, 93 Eng. Reprint, 744.

²³ *People v. Townsend*, 3 Hill (N. Y.), 479.

²⁴ *Marsh v. Loader*, 14 Com. B., N. S., 535.

²⁵ *State v. Goin*, 9 Humph. (Tenn.) 175; *State v. Doherty*, 2 Overt.

undoubtedly decreases in strength with the progress of years.²⁶ The capacity of an infant between the ages of seven and fourteen to commit a crime must, then, be satisfactorily shown by the state to warrant his conviction.²⁷ This capacity is always a question of fact,²⁸ and may be de-

(Tenn.) 80; *State v. Pugh*, 7 Jones (52 N. C.), 61; *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844, 8 South. 858; *Allen v. State* (Tex. Cr.), 37 S. W. 757; *Commonwealth v. Mead*, 10 Allen (Mass.), 398; *Irby v. State*, 32 Ga. 496; *Stage's Case*, 5 City H. Rec. 177; *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240; *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120; *Regina v. Vamplew*, 3 Fost. & F. 520; *Regina v. Manley*, 1 Cox C. C. 104.

²⁶ See *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592; *Law v. Commonwealth*, 75 Va. 885, 40 Am. Rep. 752. A number of cases are given in the old books. Thus, in *Dalt. Just.*, c. 147, it is said that an infant of the age of eight may commit homicide if it may appear that he had knowledge of good and evil, and of the peril and danger of that offense. An infant of the age of nine killed his companion of like age, confessed the felony, and was adjudged to be hanged, but judgment was respited in order that he might obtain a pardon: 1 Hale P. C. 27; *Fitz. Rep. Cor.*, 57 B; and in *Spigurnel's Case*, 1 Hale P. C. 26, *Fitz. Rep. Cor.* 118, an infant ten years old was also convicted of killing his companion, and it appearing that he could discern between good and evil, he was hanged. In *Alice de Walborough's Case*, 1 Hale P. C. 26, *Fitz. Rep. Cor.* 118, a girl of the age of thirteen was convicted of killing her mistress, and was burned. A boy between eight and nine years of age was found guilty of burning two barns, and it appearing that he had malice, revenge, craft, and cunning, he had judgment

to be hanged, and was hanged accordingly: 1 Hale P. C., Emllyn's ed., 25, note n. In *Commonwealth v. Mead*, *supra*, Bigelow, C. J., after stating the general doctrine, says: "This rule is uniformly applied in cases where children under fourteen and above seven years of age are charged with murder or other felonies. *A fortiori* is it applicable where they are accused of lesser offenses, or with the commission of acts coming within the class of *mala prohibita*. These do not so violently shock the natural, moral sense or instinct of children, and would not be so readily recognized and understood by them to be wrong, or a violation of duty, as the higher crimes of murder, arson, larceny, and the like."

²⁷ *Rex v. Owen*, 4 Car. & P. 236; *Rex v. Smith*, 1 Cox C. C. 260; *People v. Davis*, 1 Wheel. (N. Y.) 230; *Walker's Case*, 5 City H. Rec. (N. Y.) 137; *Willet v. Commonwealth*, 13 Bush (Ky.), 230; *State v. Adams*, 76 Mo. 355; *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983; *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905, 7 S. W. 328; *Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 496 (from an excellent note appended to this case we have extracted many useful statements of various propositions). In *State v. Arnold*, 13 Ired. (N. C.) 184, no evidence as to the prisoner's age was offered, his counsel merely alleging that he was apparently under fourteen years of age. The conviction was sustained.

²⁸ *State v. Learnard*, 41 Vt. 585.

terminated from the circumstances of the case; independent evidence of capacity is not essential.²⁹ The maxim applies, *malitia supplet aetatem*—malice (which is used here in its legal sense, and means the doing of a wrongful act intentionally, without just cause of excuse), supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.³⁰ In a recent case,³¹ the court laid down that the law presumes an infant under fourteen years of age not criminally responsible, and that presumption prevails until the evidence clearly establishes that he understood the nature of the offense charged and its consequences. A boy under the age of fourteen cannot, under the English law, commit the crime of rape, the law conclusively presuming that it is impossible for him to complete the offense.³² In the United States, no distinction is justly made between the crime of rape and any other crime. "An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty; and is

²⁹ State v. Toney, 15 S. C. 409.

³⁰ Broom's Legal Maxims, 8th Am. ed., 316.

³¹ Garner v. State, 97 Ark. 63, 132 S. W. 1010. In this interesting case a new trial was ordered by reason of an infant's counsel having left his case before the completion of the trial with the cognizance of the judge. The court said: "Under our law a minor cannot choose his guardian, even with the consent of the court, till he is over fourteen years of age, and the courts are required to guard with jealous care and protect an infant when his property is involved, and will it permit them to be less careful when his life is at stake? We think not."

³² Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 582; Regina v. Philips, 8 Car. & P. 736; Regina v. Jordan, 9 Car. & P. 118; Regina v. Brimilow, 9 Car. & P. 366; S. C., 2 Moo. 122. No evidence is, therefore, admissible to show that he could, in point of fact, commit the crime: Regina v. Philips, *supra*; and under the age of fourteen he cannot be convicted, even though it be proved that he has arrived at the full age of puberty: Regina v. Jordan, *supra*. In such case he may, notwithstanding, be convicted of a common assault: Rex v. Eldershaw, *supra*; Regina v. Brimilow, *supra*.

capable of emission and consummating the crime.”³³ The burden is on the state to prove capacity, and a statute providing that “carnal knowledge or sexual intercourse shall be deemed complete upon proof of penetration only” does not change the rule.³⁴ Proof that a male infant, under the age of twelve, put his hand over the mouth of a girl, while his elder brother attempted to commit a rape upon her, is not sufficient to warrant his conviction as principal in the second degree.³⁵ Infants over the age of fourteen are equally liable with adults for the commission of crimes, and no presumption of incapacity exists in their favor. “Where,” says Blackstone, “there is any notorious breach of the peace, a riot, battery, or the like (which infants when full grown are at least as liable as others to commit), for these an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one.”³⁶ A boy of fourteen or fifteen years of age may, therefore, be convicted of an assault to commit rape, where the rule is recognized that under that age he is incapable of committing the crime.³⁷ An infant under the age of twenty-one is liable to bastardy proceedings.³⁸ He may commit treason, and thus subject his estate to forfeiture.³⁹ At common law a female under ten years of age was deemed *incapable of consenting to sexual intercourse*.⁴⁰ This is generally regulated by statute in the United States. In this country, too, statutes generally prescribe the *age of consent to the marriage contract*. But at common law males under fourteen and females under twelve were conclusively presumed incapable of consent to the marriage contract.⁴¹

³³ Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio, St. 52, 35 Am. Dec. 592; People v. Randolph, 2 Park. Cr. (N. Y.) 174; Commonwealth v. Green, 2 Pick. (Mass.) 380; Wagoner v. State, 5 Lea (Tenn.), 352, 40 Am. Rep. 36. Contra: State v. Sam, 1 Winst. L. (N. C.) 300; see State v. Handy, 4 Harr. (Del.) 566.

³⁴ Hiltabiddle v. State, *supra*.

³⁵ Law v. Commonwealth, 75 Va. 885, 40 Am. Rep. 750.

³⁶ 4 Bl. Com. 22.

³⁷ State v. Handy, 4 Harr. (Del.) 566.

³⁸ Chandler v. Commonwealth, 4 Met. (Ky.) 66, 68.

³⁹ Den *ex dem.* Boyd v. Banta, 1 N. J. L. 266.

⁴⁰ O'Meara v. State, 17 Ohio St. 516; 3 Greenl. Ev., § 211; 4 Bl. Com. 212.

⁴¹ 1 Bish. Mar. & Div., § 568; 1 Bl. Com. 436; Pool v. Pratt, 1 Chip. D. (Vt.) 252; Arnold v. Earle, 2

§ 99 (98). **Same subject—Testamentary capacity—Domicile—Necessaries.**—The subject of the age of competency to make *testamentary disposition of property* has been now almost entirely withdrawn from the inquiry of the presumptions affecting it. At common law male infants might make a valid will of personal estate at the age of fourteen and females at the age of twelve, but before those ages they were presumed incompetent to make a will.⁴² The age, however has now become fixed by the statute of wills in England at twenty-one years, and in the United States there are generally local statutes regulating the age at which infants are deemed to be of testamentary capacity. That age is now almost universally fixed at twenty-one years.⁴³ The *domicile* of infants is presumed to be the same as the domicile of the parents.⁴⁴ The presumption is founded on the supposed inability of the infant to form any valid intent to change it before majority.⁴⁵ Except in the case of a natural guardian,⁴⁶ the domicile of the guardian does not determine the domicile of the ward.⁴⁷ The domicile of the father at his death, as a general rule, determines the domicile of his infant child;⁴⁸ and while the mother may then change the latter's domicile, if there be no general guardian,⁴⁹ her power in this regard ceases upon such an appointment being

Lea, 529; Governor v. Rector, 10 Humph. (Tenn.) 57; Parton v. Hervey, 1 Gray (Mass.), 119; Rex v. Gordon, Russ. & R. C. C. 48.

⁴² Deane v. Littlefield, 1 Pick. (Mass.) 239; Campbell v. Browder, 7 Lea (Tenn.), 240; 1 Redf. Wills, § 4.

⁴³ When Redfield published his work on Wills, there were very few states that had not made the twenty-one year standard, although he pointed out that in some the age for testamentary disposal of personalty was eighteen; that in Vermont females reach their legal majority for all purposes at eighteen, and that in Texas infants had then been held not competent to execute a valid will: Moore v. Moore, 23 Tex. 637. See 1 Redf., pp. 18, 19.

⁴⁴ Craignish v. Hewitt (1892), L. R. 3 Ch. 180; In re Beaumont (1893), L. R. 3 Ch. 490; Sprague v. Litherberry, 4 McLean (U. S.), 442, Fed. Cas. No. 13,251; Miller v. Sovereign Camp Woodmen of the World, 140 Wis. 505, 133 Am. St. Rep. 1095, 122 N. W. 1126.

⁴⁵ Miller v. Sovereign Camp etc., *supra*.

⁴⁶ Earl v. Dresser, 30 Ind. 11, 95 Am. Dec. 660.

⁴⁷ Lamar v. Micou, 112 U. S. 452, 471, 28 L. Ed. 751, 5 Sup. Ct. Rep. 221.

⁴⁸ Moses v. Faber, 81 Ala. 445, 1 South. 587.

⁴⁹ Carlisle v. Tuttle, 30 Ala. 613.

made.⁵⁰ A guardian may, it is held, fix and change his ward's domicile within the state of his appointment.⁵¹ The presumption is that children under the age of twenty-one years, remain *unemancipated*; and that children above that age are emancipated, unless the contrary appears.⁵² The emancipation of a minor by his parent may be inferred from the conduct of the parties or other circumstances, and is always a question for the jury.⁵³ Another presumption is that when an infant lives with his father or mother or guardian, he is properly supplied with *necessaries*; hence he is not liable for goods furnished him, in the absence of evidence rebutting the presumption.⁵⁴ When the infant is supplied with necessaries by his parent or guardian or with money to purchase the same, it is presumed that he

⁵⁰ *Moses v. Faber*, 81 Ala. 445, 1 South. 587.

⁵¹ *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; *Kirkland v. Whately*, 4 Allen (Mass.), 462; *Ex parte Bartlett*, 4 Bradf. (N. Y.) 221; *Anderson v. Anderson*, 42 Vt. 350, 1 Am. Rep. 334; *Lamar v. Micou*, 112 U. S. 452, 472, 28 L. Ed. 751, 5 Sup. Ct. Rep. 221; *Regina v. Whitby*, L. R. 5 Q. B. 325, 331. See extended note to *Schmidt v. Shaver*, (196 Ill. 108, 63 N. E. 655), 89 Am. St. Rep. 250, on the common-law powers of guardians.

⁵² *Fitzwilliam v. Troy*, 6 N. H. 166. But children, who, from want of understanding, are incapable of taking care of themselves, do not become emancipated at the age of twenty-one, if they continue under the control of their father: *Upton v. Northbridge*, 15 Mass. 237. Such children are an exception to the general rule. And whenever a child is compelled to remain under the care of his father, after his arrival at the age of twenty-one years, whether it be on account of infirmity of body or of mind, so long as he so continues, he is to be considered as not emancipated. To bring an individual

within the spirit of this exception, it is not necessary that he should be wholly deprived of the use of his reason, or that he should be actually confined to his bed with sickness. It is enough, if the state of his mind, or of his health, is such that it is fit and proper that he should remain under the care of his parent: *Orford v. Rumney*, 3 N. H. 331. See, also, *Kubic v. Zeimke*, 105 Iowa, 269, 74 N. W. 748, and note to *Craig v. Van Bebber* (100 Mo. 584, 13 S. W. 906), 18 Am. St. Rep. 573.

⁵³ *Lewis v. Missouri, K. & T. Ry. Co.*, 82 Kan. 351, 108 Pac. 95; *Haliday v. Miller*, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821; *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495, 45 L. R. A. 645, 57 Pac. 908; *Dierker, to the Use of Shoemaker, v. Hess*, 54 Mo. 246.

⁵⁴ *Assignees of Hull v. Connolly*, 3 McCord (S. C.), 6, 15 Am. Dec. 612; *Jones v. Colvin*, 1 McMull. (S. C.) 14; *Perrin v. Wilson*, 10 Mo. 451; *State v. Cook*, 12 Ired. (34 N. C.) 67; *Freeman v. Bridger*, 4 Jones (49 N. C.), 1, 67 Am. Dec. 258. But see *Parsons v. Keys*, 43 Tex. 557. See note to *Craig v. Van Bebber*, 18 Am. St. Rep. 652.

does not need credit for such purpose.⁵⁵ And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was in a state of destitution, must take upon himself the burden of proving the allegation. If he does this in a satisfactory manner his claim should be allowed. But even then it should be limited to bare necessities, and should not be allowed to embrace articles of luxury which would otherwise be suitable to the infant's fortune and condition in life.⁵⁶

§ 99a (98). **Same subject—Torts.**—Infants are liable civilly for certain of their torts in which the question of the intent is of no concern. As a general rule, in *actions for tort* the liability of the defendant does not depend upon the intent, although the malice or intent may affect the measure of damages. Hence, in civil actions for tort there is no such presumption of incapacity on the part of infants as is found in the criminal law; and there are numerous cases in which judgments have been rendered against infants for torts, although some of the infants were under seven years of age.⁵⁷ But although it is undoubtedly true, as a general

⁵⁵ *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Rivers v. Greeg*, 5 Rich. Eq. (S. C.) 274.

⁵⁶ *Rivers v. Greeg*, *supra*. In this case there are also the following interesting remarks: "It is a fallacy to suppose that a distinction can be drawn between the case where an infant is actually supplied with the necessities themselves, and that where he receives an allowance under an order of the court, which he is to disburse himself in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution that would require his necessary wants to be otherwise supplied, it is obvious that the argument applies with equal force to the case where the infant is supplied with the necessary articles for his use and consump-

tion. These he may sell, give away, or waste, so that it may become necessary that he should have more, to save him from nakedness and starvation." If these special circumstances do not appear, however, and the infant relies as a defense to an action for necessities on the fact that he was at the time properly supplied with necessities, it will seem that the burden of proving the fact rests upon him: See *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; also, *Parsons v. Keys*, 43 Tex. 557, in which case, however, it appeared that the defendant had a guardian. As to burden of proof whether articles furnished to infants are necessities, see note to *Nash v. Inman*, 14 Ann. Cas. 686.

⁵⁷ In the case of *Huchting v. Engel*, 17 Wis. 237, 84 Am. Dec. 741, a boy of little more than six years of age was held to be liable in an

rule, that infants are responsible, like other persons, for their torts, this general rule must be received with the qualification that the torts for which they are so liable must not involve an element necessarily wanting in their case. Thus, in the case of slander, malice is a necessary ingredient in the wrong. But the law presumes that an infant under the age of seven years is not *doli capax*. It is obvious, therefore, that in the case of slander an infant cannot be held liable for his tort until he arrives at that age, or acquires that capacity which renders him morally responsible for his actions. On this subject Reeve says: "There is one species of wrong for which an infant cannot be liable until he is *doli capax*, viz., slander. I find nothing satisfactory on this subject, as to at what age he is liable. By analogy to his liability for crimes which rests upon his being *doli capax*, I should suppose that he would be liable at the age of fourteen."⁵⁸ In cases of torts arising from negligence, too, the age and capacity of the infant charged with the tortious negligence may become matters of importance.

action for damages for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers growing therein. In the case of *Bullock v. Babcock*, 3 Wend. (N. Y.) 391, the defendant, a boy of twelve years of age, was held liable for damages in an action for assault and battery, for shooting an arrow, by which one of the plaintiff's eyes was put out. In *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81, the defendant, a boy thirteen years of age, in sport, but wantonly, threw a piece of mortar, which struck and put out the plaintiff's eye, and the defendant was held liable for damages in an action of assault and battery. And in *School District v. Bragdon*, 23 N. H. 507, the defendants, boys of twelve and fourteen years of age, respectively, were held liable for trespass committed in the school. So in *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457, the de-

fendant, a minor, was adjudged accountable in an action of trespass *quare clausum fregit*, although the act constituting the trespass was, as in *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177, done by the command of the defendant's father. And in *Marshall v. Wing*, 50 Me. 62, it was decided that ejectment may be maintained against an infant for a disseisin, that being a tort. See, also, *McCoon v. Smith*, 3 Hill (N. Y.), 147, 38 Am. Dec. 623; *Beckley v. Newcomb*, 24 N. H. 363. On the relation of master and servant between parent and child, see note, *Broadstreet v. Hall*, 10 L. R. A., N. S., 942.

⁵⁸ Reeve's Dom. Rel. 258. See, also, note to *Humphrey v. Douglass* (10 Vt. 71), 33 Am. Dec. 177, on the liability of infants for their torts, and to *Craig v. Van Bebber* (100 Mo. 584, 13 S. W. 906), 18 Am. St. Rep. 569, at page 720, on the torts of infants connected with contract.

For while infants are justly answerable for torts springing from their negligence, when such negligence is shown, it is evident that, in determining the question whether or not there is negligence in the given case, either on the part of the defendant or on that of the plaintiff, the age and capacity of the defendant may be important to consider. Conduct which would be considered negligent on the part of a person of full age might not be so considered in the case of an infant of tender years and immature judgment. And, on the other hand, one dealing with a person of immature capacity may be reasonably required to exercise greater care and diligence than would be demanded of him where he has to do with persons of mature judgment and of ordinary capacity.⁵⁹ That which will be negligence on the part of one infant may be proper care on the part of another, depending upon the age, discretion, intelligence, or experience, of the infant. A child of tender years has capacity to exercise only such care and self-restraint as belongs to childhood. Reasonable men are presumed to know this, and must govern themselves accordingly. The caution and care required of others toward the infant are measured by the age, the maturity, the capacity, and intelligence of the child.⁶⁰ So that, while in civil actions the law does not fix any arbitrary age when an infant is deemed incapable of exercising judgment and discretion, there are numerous instances in which courts have conclusively presumed children of tender years incapable of *contributory negligence* and have refused to submit the question to the jury.⁶¹ The

⁵⁹ See Cooley on Torts, 105.

⁶⁰ Birmingham & A. R. Co. v. Mat-tison, 166 Ala. 602, 52 South. 49.

⁶¹ Chicago Ry. Co. v. Gregory, 58 Ill. 226; Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99; Walters v. Chicago Ry. Co., 41 Iowa, 71; Mangam v. Brooklyn Ry. Co., 38 N. Y. 455, 98 Am. Dec. 66; Ihl v. Forty-second St. Ry. Co., 47 N. Y. 317, 7 Am. Rep. 450; Kay v. Pennsylvania Ry. Co., 65 Pa. 269, 3 Am. Rep. 628; Pennsylvania Co. v. James, 81 Pa. 194; Norfolk Ry. Co. v. Ormsby, 27 Gratt. (Va.) 455;

Gardner v. Grace, 1 Fost. & F. 359; Chicago Ry. Co. v. Ryan, 131 Ill. 474, 23 N. E. 385; Texas & N. O. R. Co. v. Brouillette (Tex. Civ. App.), 130 S. W. 886 (a boy two and a half years of age); Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29, 17 Det. Leg. N. 1074 (five years and four months old); Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183 (five years old); Barretto v. Mouguin-Offerman-Wells Coal Co., 126 N. Y. Supp. 1009. See, also, Mott v. Packard, 108 Me. 247, 80 Atl. 279.

cases show that this presumption has been indulged in by the court respecting children varying in age from one to seven years.⁶² A child, too young to exercise any care or discretion, is clearly as incapable of negligence as it is of crime or sin, and is therefore not answerable to the doctrine of self-defense. There are ages so young (usually under seven) that there is a conclusive presumption of law, and hence evidence is not admissible to refute the presumption; while there are other ages, usually seven, after reaching which it becomes a *prima facie* presumption only, and may then be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like. This *prima facie* presumption continues in its favor till it reaches another age, usually fourteen, after which the presumption changes, and the burden is then on the infant to show want of capacity or understanding. The question as to whether a child's capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible.⁶³ Where the infant is under fourteen years of age, the burden rests upon the defendant to rebut the legal presumption of incapability of contributory negligence.⁶⁴ As to those over fourteen years of age the *prima facie* capability of negligence attaches.⁶⁵ Each case must depend upon the intelligence and capacity of the child and the surrounding facts rather than upon any

⁶² See cases last cited.

⁶³ Birmingham & A. R. Co. v. Mat-tison, *supra*.

⁶⁴ Virginia-Carolina Ry. Co. v. Clawson's Admr., 111 Va. 313, 68 S. E. 1003.

⁶⁵ Birmingham & A. R. Co. v. Mal-lison, *supra*. As to other ages near thereto, see Gress v. Philadelphia & R. R. Co., 228 Pa. 482, 77 Atl. 810 (a few days less than fourteen); Ray-field v. Sans Souci Park, 147 Ill. App.

493 (between thirteen and fourteen, running into a sheet of glass in a maze of mirrors); Burke v. Chicago City R. Co., 153 Ill. App. 388 (eleven years and seven months, boy crossing a car track failing to look both ways); German-American Lumber Co. v. Hannah, 60 Fla. 76, 53 South. 516; Virginia-Carolina Ry. Co. v. Clawson's Admr., *supra*; Connor v. Wabash R. Co., 149 Mo. App. 675, 129 S. W. 777.

arbitrary rule. It cannot be said on the one hand that a child just past seven years is *sui juris* so as to be charged with negligence, nor, on the other hand, that a child just under that age is wholly incapable of exercising care.⁶⁶ It has generally been held that, since there is no exact period fixed by the law at which there is no doubt as to whether the child is *sui juris*, the question of intelligence and ability to exercise care is for the jury under proper instructions from the court.⁶⁷ But it has been held that, in the absence of

⁶⁶ *Stone v. Dry Dock Co.*, 115 N. Y. 104, 21 N. E. 712; *Indianapolis etc. Ry. v. Pitzzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70. There is no presumption that minors under fourteen years of age are without discretion and judgment: *George v. Los Angeles R. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184, 46 L. R. A. 829, 58 Pac. 819. It must be presumed until otherwise shown that a minor has exercised the care and circumspection expected of one of his years: *Dubiver v. City Ry. Co.*, 44 Or. 227, 1 Ann. Cas. 889, 74 Pac. 915, 75 Pac. 693. Indeed, it is even held that, in the absence of evidence to the contrary, it will be presumed that the discretion of a child of eleven years to exercise due care for his own safety is equal to that of an adult: *Over v. Missouri etc. R. Co.* (Tex. Civ. App.), 73 S. W. 535. The presumption that a child fourteen years old has capacity to avoid danger can only be overthrown by clear proof of the absence of such discretion: *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35, 32 Am. Rep. 413. In an action for negligence causing the death of a thirteen year old boy in defendant's employ, the presumption is that the boy was careful: *Rogers v. Samuel Meyerson Ptg. Co.*, 103 Mo. App. 683, 78 S. W. 79. A boy who is nearly eighteen years of age, employed in a machine-shop, is presumed to have sufficient capacity to be sen-

sible of danger and to avoid it: *Sanborn v. Atchison etc. R. Co.*, 35 Kan. 292, 10 Pac. 860. Likewise it will be presumed that a child nearly sixteen years of age knew a heated roller would burn her hand: *Phillips v. Michael*, 11 Ind. App. 672, 39 N. E. 669. And it is also presumed that a boy of sixteen years of age recognizes the patent danger of climbing on moving cars: *Worthington v. Go-forth*, 124 Ala. 656, 26 South. 531. And where a child four years old is run over by a team and wagon in a public street, in the absence of anything to indicate that she ran hastily or impulsively under the horses or the wagon, it cannot be presumed that she did so: *Summers v. Bergner Brewing Co.*, 143 Pa. 114, 24 Am. St. Rep. 518, 22 Atl. 707.

⁶⁷ *Houston Ry. Co. v. Simpson*, 60 Tex. 103; *Strawbridge v. Bradford*, 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346; *Dealey v. Muller*, 149 Mass. 432, 21 N. E. 763; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401, 21 L. Ed. 114; *Arkansas Val. Trust Co. v. McElroy*, 97 Ark. 160, 133 S. W. 816; *Boland v. Connecticut Co.*, 83 Conn. 456, 76 Atl. 1005; *Fonner v. Stamatakos*, 153 Ill. App. 147; *Shortridge v. Searright Estate Co.*, 145 Mo. App. 295, 130 S. W. 126; *Obermeyer v. Logeman Chair Mfg. Co.*, 229 Mo. 97, 129 S. W. 209; *Zwirn v. Joline*, 122 N. Y. Supp. 231;

proof to the contrary, a child fourteen years of age is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it.⁶⁸

§ 100 (99). Presumption as to identity from name.—One of the most easily rebutted presumptions, notwithstanding its great convenience, is that which infers an identity of person from an identity of name, and since names are used for the very purpose of identifying persons, it is not infrequently presumed that a given name identifies the person bearing such name. In some states the codes have embodied it in their list of disputable presumptions;⁶⁹ although, of course, it gathers no extra strength from its statutory enactment.⁷⁰ Thus, in proving title to land where the same name appears in different conveyances as grantee and grantor, the circumstances may be such as to reasonably create the presumption that they describe the same person,⁷¹ notwith-

Barretto v. Mouquin-Offerman-Wells Coal Co., 126 N. Y. Supp. 1009; *Specht v. Waterbury Co.*, 70 Misc. Rep. 404, 127 N. Y. Supp. 137; *Verdon v. Crescent Automobile Co.*, 81 N. J. L. 199, 76 Atl. 346; *St. Louis etc. R. Co. v. Bolen* (Tex. Civ. App.), 129 S. W. 860; *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140.

⁶⁸ *Nagle v. Allegheny Ry. Co.*, 88 Pa. 35, 32 Am. Rep. 413.

⁶⁹ Cal. Code Civ. Proc., § 1963 (25) (identity of person from identity of name).

⁷⁰ *People v. Mullen*, 7 Cal. App. 547, 94 Pac. 867, in which case it was held that, where the defendant was charged with manslaughter in the killing of one Patrick Connolly, and there was evidence showing that the deceased's death resulted from a blow on the head, delivered by the defendant, and that defendant was seen at the inquest over the body of Patrick Connolly, at which the cause of his death was found to be a fracture through the temporal bone, it must be presumed from the identity

of name, in the absence of evidence to the contrary, that the person on whom the inquest was held was the same person whom the defendant was charged with killing.

⁷¹ *Hunt v. Stewart*, 7 Ala. 527; *Givens v. Tidmore*, 8 Ala. 745; *Mott v. Smith*, 16 Cal. 533; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Heacock v. Lubukee*, 108 Ill. 641; *Gilman v. Sheets*, 78 Iowa, 499, 43 N. W. 299; *Campbell v. Wallace*, 46 Mich. 320, 9 N. W. 432; *Geer v. Missouri Lumb. & Min. Co.*, 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; *Einstein v. Holladay-Klotz Land & Lumber Co.*, 132 Mo. App. 82, 111 S. W. 859. See, also, 1 Devlin, Deeds, 2d ed., §§ 183, 184; *Galveston etc. R. R. v. Stealey*, 66 Tex. 468, 1 S. W. 186; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. 569; *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824; *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468; *Smith v. Gillum*, 80 Tex. 120, 15 S. W. 794; *Atchison v. McCulloch*, 5

standing the places of residence named in the respective deeds are not the same.⁷² The weight to be attached to this presumption of course varies greatly with the circumstances of the case. If the name is a very common one, or if it appears that there are several persons of the same name and location,⁷³ or that the presumption would establish an inconsistent relation,⁷⁴ or impeach the record of a court,⁷⁵ the identity of persons is not to be inferred from identity of name.⁷⁶ This presumption has been applied in respect to letters;⁷⁷ bills of exchange and promissory notes and acceptances;⁷⁸ powers of attorney;⁷⁹ judgments;⁸⁰ indictments;⁸¹ names of witnesses in a record of conviction;⁸² names in the service of process;⁸³ plaintiff and defendant bearing the same name;⁸⁴ and the identity of a deceased person.⁸⁵ But it is otherwise if the *name is unusual*, or if

Watts (Pa.), 13; Grant v. Searcy (Tex. Civ. App.), 35 S. W. 861; Bogue v. Bigelow, 29 Vt. 179; Cross v. Martin, 46 Vt. 14.

⁷² Carleton v. Townsend, 28 Cal. 219; Tillotson v. Webber, 96 Mich. 144, 55 N. W. 837.

⁷³ Jones v. Jones, 9 Mees. & W. 75; Aultman v. Timm, 93 Ind. 159; Goodell v. Hibbard, 32 Mich. 48; People v. Wong Sang Lung, 3 Cal. App. 221, 84 Pac. 843; Flournoy v. Warden, 17 Mo. 435.

⁷⁴ Cooper v. Poston, 1 Dunl. 92 (maker and payee of note having same name); Ellsworth v. Moore, 5 Iowa, 486.

⁷⁵ Bryan v. Kales, 3 Ariz. 423, 31 Pac. 517.

⁷⁶ Wickersham v. People, 2 Ill. 128; Cozzens v. Gillispie, 4 Mo. 82. See note to Rupert v. Penner, 17 L. R. A. 824.

⁷⁷ Harrington v. Foy, 1 Ryan & M. 90.

⁷⁸ Roden v. Ryde, 4 Q. B. 626, 114 Eng. Reprint, 1034; Warren v. Anderson, 8 Scott, 384; Greenshields v. Crawford, 9 Mees. & W. 314; Hunt v. Stewart, 7 Ala. 525; McConeghy v. Kirk, 68 Pa. 200; Jones v. Jones, *su-*

pra (where the two names signed as makers were identical).

⁷⁹ Burford v. McCue, 53 Pa. 427.

⁸⁰ Thompson v. Manrow, 1 Cal. 428; Garwood v. Garwood, 29 Cal. 515; Douglas v. Dakin, 46 Cal. 49; Mallory v. Riggs, 76 Iowa, 748, 39 N. W. 886; Campbell v. Wallace, 46 Mich. 320, 9 N. W. 432; Green v. Heritage, 63 N. J. L. 455, 43 Atl. 698; Agate v. Richards, 5 Bosw. (N. Y.) 456; Hatcher v. Rocheleau, 18 N. Y. 86; Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; Hesketh v. Ward, 17 U. C. C. P. 190.

⁸¹ State v. Kelsoe, 76 Mo. 505.

⁸² People v. Rolfe, 61 Cal. 541; Bayha v. Mumford, 58 Kan. 445, 49 Pac. 601; State v. Kelsoe, *supra*; State v. McGuire, 87 Mo. 642.

⁸³ Veasey v. Brigman, 93 Ala. 548, 13 L. R. A. 541, 9 South. 728.

⁸⁴ Wilson v. Benedict, 90 Mo. 208, 2 S. W. 283; Allin v. Chadburne, 1 Dana (Ky.), 68, 25 Am. Dec. 121; Sweetland v. Porter, 43 W. Va. 189, 27 S. E. 352; Tavenner v. Barrett, 21 W. Va. 656.

⁸⁵ State v. Kilgore, 70 Mo. 546; People v. Mullen, 7 Cal. App. 547, 94

there is identity of name with corroborating circumstances as similarity of age, occupation, place of abode.⁸⁶ The fact that the *family* name and initials are the same raises no presumption that the parties are the same.⁸⁷ If *father and son* have the same name, in the absence of proof, it will be presumed, when the name is used without any addition of senior or junior, that the father is intended.⁸⁸ This has been illustrated in the case of legacies, notes, and other instruments; but it is a presumption which may be *easily rebutted* by circumstances showing another intention.⁸⁹ Indeed, most of the cases which have been cited are authority for the proposition that the presumption under discussion is

Pac. 867. See, also, able and exhaustive treatment of subject in 6 Ency. of Ev. 913-921, and in the note appended to *Rupert v. Penner*, 17 L. R. A. 824. For a comprehensive note on "*Idem Sonans*," giving alphabetical lists of names held to be and not to be *idem sonans*, together with the rules for pronunciation in certain disputed names and the general application of the doctrine, see note to *Thornilly v. Prentice* (121 Iowa, 89, 96 N. W. 728), 100 Am. St. Rep., at page 322.

⁸⁶ *Hamilton v. Foy*, 1 Ryan & M. 90; *Jones v. Parker*, 20 N. H. 31; *Hodgkinson v. Willis*, 3 Camp. 401; *Smith v. Henderson*, 9 Mees. & W. 798; *Hennel v. Lyon*, 1 Barn. & Ald. 182, 106 Eng. Reprint, 67; *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504. The presumption does not apply if the transactions are very remote: *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207.

⁸⁷ *Jones v. Turnour*, 4 Car. & P. 204; *Loudon v. Walpole*, 1 Ind. 319; *Bennet v. Libhart*, 27 Mich. 489; *Burford v. McCue*, 53 Pa. 431; *Houk v. Barthold*, 73 Ind. 22.

⁸⁸ *Sweeting v. Fowler*, 1 Stark. 106; *State v. Vittum*, 9 N. H. 519; *Jones v. Newman*, 1 W. Black. 60, 96 Eng. Reprint, 32; *Kincaid v. Howe*,

10 Mass. 203; *Padgett v. Lawrence*, 10 Paige Ch. (N. Y.) 170, 40 Am. Dec. 232; *Jarmain v. Hooper*, 5 Man. & G. 827; *Graves v. Colwell*, '90 Ill. 613. It is error to exclude evidence of the surrounding circumstances to explain the acts in question. The addition of "Jr." is no part of the name: *Clark v. Groce*, 16 Tex. Civ. App. 453, 41 S. W. 668, and cases cited above. Where father and son have the same name as the grantee in a conveyance of land, and neither is otherwise designated therein as the grantee, the father will be presumed to be the grantee if other things are equal and there is no evidence to the contrary. The fact that the son in this case gave a mortgage to the father on the land described in a deed, in which the name of the grantee was the same as their own, and the father accepted the mortgage, placed it on record, and afterward sold it, is sufficient to rebut any presumption that might otherwise arise that the father was the grantee: *Hess v. Stockard*, 99 Minn. 504, 109 N. W. 1113.

⁸⁹ *Lepiot v. Browne*, 1 Salk. 7, 91 Eng. Reprint, 6; *Stebbing v. Spicer*, 8 Com. B. 827; *Sweeting v. Fowler*, 1 Stark. 106.

one which may be easily rebutted by satisfactory proof. Where the presumption is raised, suitable explanation is sufficient to repel it; and all the circumstances necessary to dispel the false appearance of the identity are relevant and competent to expose the error.⁹⁰

§ 101 (100). Conflicting presumptions—That of innocence prevails over other presumptions.—It is often said that one presumption stands opposed to another, and that it becomes necessary to determine which one shall prevail. Until such time as there is an authoritative revision of legal terms, we are perforce compelled to continue those in use, albeit they are inherently confusing and, *vires acquirit eundo*, become more difficult to use as they become clogged with definitions which take in part of what is legally sound and part of what is colloquial, irrespective of legal accuracy or foundation. When it is recognized that a presumption is merely a direction of law that when certain facts are presented in an invariable formula the finding thereon shall always be the same way, the logical impossibility of a conflict of presumptions becomes apparent. "What really happens in a case of so-called conflicting presumptions is, the legal conclusion or presumption which ordinarily attaches to certain facts is prevented from attaching either by facts or by a rule of law inconsistent therewith. It is a logical and legal impossibility for two rules of law to affix inconsistent conclusions to the same state of facts at the same time."⁹¹ The market values, so to speak, of the various presumptions have been sometimes sought to be established,

⁹⁰ *White v. Commonwealth*, 80 Ky. 480; *State v. Witham*, 72 Me. 531; *Benson v. State*, 39 Tex. Cr. 56, 44 S. W. 167, 1091. In *State v. Witham*, *supra*, when a state witness said he saw the defendant walk with a certain woman at a certain day, hour and place, it was competent evidence for the defendant to prove by another witness that at the time and place referred to he saw the woman and a man, and that the man with her was not the defendant. In *Shuler v.*

State, 125 Ga. 778, 54 S. E. 689, the mere identity of name appearing from the signature of the attesting officer and that of a person who signed an accusation as prosecuting attorney was held not to warrant the assumption, as matter of law, that the same individual acted not only as a notary public but also in the capacity of solicitor of the city council.

⁹¹ 9 Ency. of Ev., "Presumptions," p. 891.

but so far there is no recognized standard. Keeping, then, to the expression as it is used, we may have the case of one party to a cause relying upon a given presumption and that of the other party upon another. Which party is to prevail? In every case it depends on the nature of the respective presumptions. If the one is such that the law has said that in that particular connection it shall prevail, then the other is out of the question, for the law has never said that from a given set of circumstances two different presumptions shall arise, shall prevail over all other presumptions and over each other. The *reductio ad absurdum* helps to demonstrate the proposition. Generally speaking, there is no legal presumption so highly favored as that of innocence; and in numerous cases other presumptions have yielded to this. It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, it is said that in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant.⁹² This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him.⁹³ If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity

⁹² *People v. Roderigas*, 49 Cal. 9; *Commonwealth v. Whittaker*, 131 Mass. 224; *West v. State*, 1 Wis. 209; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; 1 Greenl. Ev., §

35. See § 101a, *post*, as to the presumptions of chastity and innocence.

⁹³ *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799, 17 Sup. Ct. Rep. 375.

and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts.⁹⁴ It has frequently been held that a jury might presume the death of the husband or wife when the other spouse had married a second time, allowing the presumption of innocence to prevail over that of *continuance of life*.⁹⁵ It is not necessary, in order that the presumption of continuance of life be overcome in such cases, that absence should continue over several years; a much less period of time has been held sufficient.⁹⁶ But it does not follow that the presumption of innocence will prevail in all cases where the presumption of the continuance of life would impute crime;⁹⁷ by the weight of authority there is no rigid presumption in this case to be in-

⁹⁴ *Dunlop v. United States*, *supra*. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a bloody dagger in his possession, it would raise, in the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong according to the circumstances, that those marks had been made by the feet of the accused person.

⁹⁵ *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Sneathen v.*

Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497; *Price v. Price*, 124 N. Y. 589, 12 L. R. A. 359, 27 N. E. 383; *Charles v. Charles*, 41 Minn. 201, 42 N. W. 935; *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407; *Breiden v. Paff*, 12 Serg. & R. (Pa.) 430; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *In re Taylor*, 9 Paige Ch. (N. Y.) 611; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Yates v. Houston*, 3 Tex. 433; *Dickerson v. Brown*, 49 Miss. 357. As to negligence, see § 15, *ante*.

⁹⁶ *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232, and also cases cited in *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407. As to presumptions of continuance of life and death, see § 60 et seq., *ante*. As to presumptions of innocence, see § 12 et seq., *ante*.

⁹⁷ *Rex v. Harborne*, 2 Adol. & El. 540, 111 Eng. Reprint, 209 (absence of only twenty days); *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

flexibly followed aside from the circumstances of the case. It is a question of fact to be determined upon the evidence of the particular case, including the length of time of absence and the age, condition, health and habits of the absent party, as well as the other circumstances of the case.⁹⁸ Of course, where the absence has been long continued and the absent party long unheard of, the presumption of innocence may be held to prevail over the other as a matter of law.⁹⁹

⁹⁸ *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Rex v. Harborne*, 2 Adol. & El. 540, 111 Eng. Reprint, 209; *Greensborough v. Underhill*, 12 Vt. 604; *Northfield v. Plymouth*, 20 Vt. 582.

⁹⁹ *Kelly v. Drew*, 12 Allen (Mass.), 107, 90 Am. Dec. 138 (sixteen years); *Harris v. Harris*, 8 Bradw. (8 Ill. App.) 57 (nine years); *Johnson v. Johnson*, *supra*. In *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407, the court said: "The law presumes the continuance of life for seven years, but it also presumes against the commission of crime. It is contended that the death of the husband ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a crime." In *Yates v. Houston*, 3 Tex. 440, four years only had elapsed after the disappearance of the wife before the husband and another woman appeared as husband and wife, under circumstances raising the presumption of marriage, and in considering the subject of the conflicting presumptions the court held that "the rational presumption after this lapse of time is that the former wife is dead. The ordinary presumption of the continuance of life should not, under the facts in the case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their contracting the matrimonial

relation." In *Dixon v. People*, 18 Mich. 84, the supreme court of the state, in reviewing the case, said: "The presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive—rendered it obligatory on the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of her marriage with defendant." In *Senser v. Bower*, 1 Penr. & W. (Pa.) 450, the court, in determining the validity of a second marriage, say: "But there is said to be the same evidence of a precedent marriage, of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the proof being equal, the presumption is in favor of innocence. And so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail." In *Hull v. Rawls*, 27 Miss. 471, the proof showed that petitioner and Rawls were married December 6, 1848, and that in 1844 Rawls was living with another woman whom he recognized as his wife. The court said: "The fact that the deceased (Rawls) was living in 1844 with a woman believed to be his wife is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity." The case of *Chapman v. Cooper*, 5 Rich. (S. C.)

On the same principle it has been presumed that a divorce from a former marriage had been obtained, thus allowing the presumption of innocence to prevail over that of the *continuance of the existing state of things*.¹⁰⁹ In like manner the presumption of innocence prevails over the presumption of *payment*,¹ and over that of *marriage* arising from cohabitation and repute;² but where it is shown that a cohabitation was illicit in its origin, it is presumed to have continued of that character until rebutted.³

§ 101a (100). Conflicting presumptions—Chastity and innocence.—All women are presumed to be virtuous until the contrary appears.⁴ But when this presumption involves the guilt of another, it is necessary to inquire whether the law has, in the case of statutory offenses, made the offense

452, was where five or six years only had intervened between the time the former husband was last heard from and the second marriage of the wife, and the court held that under the facts of that case (the case having been brought many years afterward), the presumption of innocence ought to prevail. See, also, *Greenborough v. Underhill*, 12 Vt. 604; *Northfield v. Plymouth*, 20 Vt. 582.

¹⁰⁹ *Carroll v. Carroll*, 20 Tex. 731; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245. Divorce may be presumed in favor of innocence, although there is no evidence of such divorce. See § 14, *ante*.

¹ *Potter v. Titcomb*, 7 Me. 302.

² *Clayton v. Wardell*, 4 N. Y. 230. For presumptions as to marriage in actions for bigamy, adultery and the like, see §§ 14 and 86 et seq., *ante*.

³ See discussion on this subject, § 89, *ante*.

⁴ *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573. In the case of *Wood v. State*, 48 Ga. 193, 15 Am. Rep. 664, a majority of the court held that the true test of virtue in a female under the seduction statute was a personal, physical test; that

if, at the time of the alleged seduction, the female had never had unlawful sexual intercourse with man, she was a virtuous female within the meaning of the law. Or, as expressed by Chief Justice Bleckley in the *O'Neil* case, *supra*: "Every virgin is virtuous." In other words, the question is not one of purity of heart or mind, but actual, physical purity of person. This is obviously the only plain and practical test that can be laid down as applicable to the crime of seduction. The test of moral or mental chastity is entirely metaphysical and impracticable: *Jones v. State*, 90 Ga. 616, 16 S. E. 380; *O'Neil v. State*, 85 Ga. 408, 11 S. E. 857; *McTyier v. State*, 91 Ga. 255, 18 S. E. 140; *Washington v. State*, 124 Ga. 426, 52 S. E. 910; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Kelley*, 191 Mo. 630, 90 S. W. 834; *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776; *State v. Wells*, 48 Iowa, 671; *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652; *Slocum v. People*, 90 Ill. 274.

one against women generally or chaste women expressly. When the chastity of an unmarried woman is involved in a criminal proceeding, the presumption of the prisoner's innocence as opposed to that of her chastity falls generally within the rule stated in the last section.⁵ In an Indian Territory seduction case,⁶ the court said that it was not the law that the presumption of chastity was overcome by that of the prisoner's innocence. The statute in that case did not refer to *chaste* women. "The defendant is presumed to be innocent until his guilt is shown beyond a reasonable doubt; and therefore the government must prove it to that degree of certainty. But the prosecutrix is presumed to be chaste; and therefore, the act of sexual intercourse, procured by the promise of marriage, being proven, the burden is on the defendant to introduce sufficient proof to raise a reasonable doubt as to her chastity. Under our statute, it is, like justifiable homicide or insanity, or an alibi, a matter of defense."⁷ As a fact, no conflict exists. The idea that it does arise from a want of discrimination between a statute which refers to the crime of seduction of a woman and one which refers to the seduction of a woman previously chaste. In several decisions in Michigan,⁸ where the offense was the seduction of any unmarried woman, without mention of her previous chastity, the subject has received careful attention, especially with regard to where prosecutions have been commenced after a period during

⁵ Dunlop v. United States, *supra*.

⁶ Kerr v. United States, 7 Ind. Ter. 486, 104 S. W. 809.

⁷ In Polk v. State, 40 Ark. 486, 48 Am. Rep. 17, the supreme court of that state say: "It is not, indeed, expressed in the statute, as it is in the statute of New York and some of the other states, that the woman should have been of previous chaste character, but it is plainly implied. . . . Since in the female sex chastity is the rule, and want of it the exception, the presumption is in favor of virtue. No evidence is required to establish it in the first instance;

and the burden is on the defendant, if he would assail it, notwithstanding the presumption of his innocence." And cite in support of the rule, Andre v. State, 5 Iowa, 398, 68 Am. Dec. 708; Boak v. State, 5 Iowa, 430; State v. Higdon, 32 Iowa, 262. See, also, Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929; State v. Turner, 82 S. C. 278, 17 Ann. Cas. 88, and note, 64 S. E. 424; and also note to Bradshaw v. Jones, 76 Am. St. Rep. 680.

⁸ People v. Squires, *supra*, and cases in notes 9 and 10, *post*.

which intercourse has taken place at different times. In such cases, that is, where previous unchastity had been proven, the nature of the case made it necessary for the people to establish beyond a reasonable doubt that immediately preceding the offense the prosecutrix was chaste and virtuous.⁹ If there had been no evidence of prior unchastity, the case would have been sustained by the presumption in favor of the purity and innocence which arises where no repugnant indications appear.¹⁰ In three states, however, at least, it has been held that the woman's chastity is to be both averred and proved. In Wisconsin the court said¹¹ that while every female charged with an offense, the essence of which was unchastity, was presumed to be chaste, this humane presumption, "pregnant with the testimony it bears to the dignity and honor of human nature, is always to be used, in the administration of justice, as a weapon of defense, not of assault. It is the shield of the accused, not the sword of the prosecutor," and her chastity in prosecution of another must be proved. "The previous chaste character of the female is one of the most essential elements of the offense, made so by the express words of the statute, in conformity with the suggestions of sound reason. A prostitute may be the subject of rape, but not of seduction. It is the chastity of the female which the statute is designed to protect. The pre-existence of that chastity is a *sine qua non* to the commission of the crime. That is the subject of legal guardianship, provided by this section. It is a substantive matter necessary to be averred and proved. If the prosecutrix were to change places, and were she indicted for lascivious conduct, then, indeed, the legal presumption would come to her aid, and her chastity would be presumed. But when the state accuses one of its citizens with the violation of the chastity of another of its citizens by seduction, the law presumes the accused to be innocent of the entire offense, until the contrary appears. The state cannot be permitted to presume the *immediate* pre-existence of that chastity, with the destruction of which the

⁹ People v. Clark, 33 Mich. 112.

¹¹ West v. State, 1 Wis. 186.

¹⁰ People v. Brewer, 27 Mich. 134.

defendant is charged. One act of illicit intercourse affords no presumption that another has not preceded it."¹² In Arkansas, the courts appear to have followed, to a certain extent, the Wisconsin rule.¹³ In Massachusetts the court ruled that the chastity of the woman must be proved in the same manner as any other material allegation in the indictment.¹⁴ Not only, then, do the authorities show that in truth no such conflict exists, but that the allegation and proof are only called for, if the words of the statute demand the inclusion in the indictment of the fact that the woman is chaste.¹⁵

¹² The case dates from 1853, and so far as appears by Bailey's Digest (1903), no other cases were decided during the preceding fifty years on the point.

¹³ *Walton v. State*, 71 Ark. 398, 75 S. W. 1, the chastity was not alleged in the indictment, nor does the statute on which it is founded say that the woman must be "of previous chaste character," but that is implied according to *Polk v. State*, 40 Ark. 486, 48 Am. Rep. 17. The question is dealt with in *Puckett v. State*, 71 Ark. 62, 70 S. W. 1041, and at length in *Caldwell v. State*, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929, and resolves itself into this, that if a statute creating the crime of seduction makes no reference to the chastity of the woman, the state is not required to allege and prove her chastity as an element of the crime, and that if it does make the reference, then the chastity would have to be alleged and proved. Material allegations of that kind in an indictment for felony cannot be proved by presumption, for the defendant is presumed to be innocent until the contrary is shown by proof of the allegations in the indictment. This rule is well established: *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *West v. State*, 1 Wis. 187 (209); *State v. McDaniel*, 84 N. C. 803; *Za-*

briskie v. State, 43 N. J. L. 640, 39 Am. Rep. 610; *Commonwealth v. Whittaker*, 131 Mass. 224; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933.

¹⁴ *Commonwealth v. Whittaker*, 131 Mass. 224. The words of the statute, however, are "woman of a chaste life," and the difference of proving a woman to be chaste and to be of a chaste life is, of course, apparent.

¹⁵ In proving the previous chaste character, the general reputation of the woman for chastity is admissible in corroboration of her own testimony, since usually this is the only corroborative evidence, as, in the nature of the case, is obtainable: *State v. Lockerby*, 50 Minn. 363, 36 Am. St. Rep. 656, 52 N. W. 958; *People v. Samonset*, 97 Cal. 448, 32 Pac. 520. In some states the statute requires that the woman shall be of good repute: *Bowers v. State*, 29 Ohio St. 542; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. Bryan*, 34 Kan. 63, 8 Pac. 260. In such case there is usually no presumption of the woman's good repute, but this must be affirmatively shown by the prosecution: *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Oliver v. Commonwealth*, 101 Pa. 215, 47 Am. Rep. 704; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; *State v. McCas-*

§ 102 (101). Continued—Presumption of innocence of a party overcomes the presumption of innocence of a stranger. The rule in the Dunlop case should go far toward solving the difficulty encountered when presumption meets presumption. Much of the error arises from a want of due consideration of the respective propositions. For example, the headline of this section¹⁶ conveys a discussion on the strife between two presumptions—both of innocence—the one of an accused, the other of a stranger to the proceeding. A little thought will disclose the impossibility of such a condition. Recalling that the rule is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the accused, and that where such proof constitutes a link in the chain of evidence against him, it has no application, we can see that the presumption of the defendant's innocence, which exists from the alpha to the omega of the case, must prevail, except and until the prosecution proves its case. If, during the course of the case, certain facts are proved from which at other times a presumption arises, but which by the very fact of the prisoner being deemed at that time innocent cannot arise, then logically the two presumptions never meet.¹⁷ Hence the court will always indulge the presumption of innocence in favor of the accused, when such presumption is met by a counter-presumption of innocence on the part of a stranger. In a prosecution for bigamy it became necessary for the

key, 104 Mo. 644, 16 S. W. 511. See, also, extended note to *Bradshaw v. Jones* (103 Tenn. 331, 52 S. W. 1072), 76 Am. St. Rep. 655, on what is seduction, and the notes on the crime of seduction as defined in the American statutes, *People v. De Fore* (64 Mich. 693, 31 N. W. 585), 8 Am. St. Rep. 870; seduction as a criminal offense, *State v. Carron* (18 Iowa, 372), 87 Am. Dec. 405-411; civil action for seduction, *Weaver v. Bachert* (2 Pa. 80), 44 Am. Dec. 162-179; *Coon v. Moffett* (2 Penn. (N. J. L.) 583), 4 Am. Dec. 403-407.

¹⁶ The reason for continuing the use of the popular terminology has been already given.

¹⁷ By way of illustration, suppose from a given state of facts a given inference is always to be presumed except where they involve the guilt of another; if and when those facts are met by the presumption of a prisoner's innocence, then the very elements which would call that presumption into being are inert, and what would otherwise be presumed must be proved. The Dunlop case is discussed in § 101, *ante*.

state to prove a marriage in Prussia. There was evidence of a religious ceremony; but no proof of a civil contract before a magistrate, which the Prussian law required. It was argued that as the religious ceremony was a violation of the penal law without such prior contract, it should be presumed. But the court refused to so hold on the ground that to do so would overcome the presumption of the prisoner's innocence by the no stronger presumption of the innocence of a stranger in a proceeding in which the stranger was not on trial.¹⁸ Suppose it became necessary in a criminal case to prove a valid marriage under our statutes. It authorizes certain civil and religious officers to perform the ceremony. It forbids all others from doing so under severe penalties. Would it be sufficient, in such case, for the prosecutor to show that the ceremony was performed by some person, without any proof whatever that he was an authorized person, and then tell the jury, that, inasmuch as he was liable to penalties if he performed the ceremony without, they might find, from the fact that he had performed it, that he was authorized? This would hardly be claimed. This reasoning of Paine, J., in the Wisconsin case¹⁹ well illustrates the discussion which is raised not so much on the paramount influence of the presumption of innocence as on the vain-glorious attribute of its overcoming other presumptions in a conflict which legally and logically never occurs.

§ 103 (102). Innocence—Sanity—Weight of conflicting presumptions.—It is one of the misfortunes of our civilization that at this present day of enlightenment it has to be confessed that on so important a subject as the alleged insanity of an accused person there should exist a conflict of opinion as to the operation of the two presumptions of sanity and innocence, and in our opinion a conflict without real reason or justification. The conflict has been and still is. Notwithstanding the unconscious bias which the lawyer has, as a rule, toward the weight of authority, we feel that the conflict is being perpetuated in consequence of a dis-

¹⁸ Weinberg v. State, 25 Wis. 370.

¹⁹ Weinberg v. State, *supra*.

inclination of locality to disturb its line of cases, even to bring them into accord with United States supreme court decision. Let us take an entirely independent observation of the position. The presumption that in the absence of proof to the contrary all men are sane is conceded.²⁰ There need be no speculation as to the location of the two pre-

²⁰ *People v. Myers*, 20 Cal. 518; *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *In re Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *In re Barber*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Rogers v. Rogers*, 6 Penne. (Del.) 267, 66 Atl. 374; *State v. Pratt*, 1 Houst. Cr. (Del.) 249; *State v. Danby*, 1 Houst. Cr. (Del.) 166; *Armstrong v. Timmons*, 3 Harr. (Del.) 342; *Davis v. State*, 44 Fla. 32, 32 South. 822; *Holsenbake v. State*, 45 Ga. 43; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *People v. Waters*, 1 Idaho, 560; *Fisher v. People*, 23 Ill. 218; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Montag v. People*, 141 Ill. 75, 30 N. E. 337; *Lilly v. Waggoner*, 27 Ill. 395; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Argo v. Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679; *Sanders v. State*, 94 Ind. 147; *Achey v. Stephens*, 8 Ind. 411; *Dearmond v. Dearmond*, 12 Ind. 455; *Rush v. Megee*, 36 Ind. 69; *Kriel v. Commonwealth*, 5 Bush (Ky.), 362; *Covington v. O'Meara*, 133 Ky. 762, 119 S. W. 187; *Andrews v. Committee*, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Ireland v. White*, 102 Me. 233, 66 Atl. 477; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Commonwealth v. Heath*, 11 Gray (Mass.), 303; *Bonfanti v. State*, 2 Minn. 123; *Mullins v. Cottrell*, 41 Miss. 291; *Ricketts v. Joliff*, 62 Miss. 440; *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *State*

v. Redemeier, 71 Mo. 173, 36 Am. Dec. 462; *State v. Hartley*, 22 Nev. 342, 28 L. R. A. 33, 40 Pac. 372; *Perkins v. Perkins*, 39 N. H. 163; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 778; *Brotherton v. People*, 75 N. Y. 159; *People v. Kirby*, 2 Park. Cr. (N. Y.) 28; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *State v. Starling*, 51 N. C. 366; *Lynch v. Commonwealth*, 77 Pa. 205; *Coyle v. Commonwealth*, 100 Pa. 573, 45 Am. Rep. 397; *Commonwealth v. Woodley*, 166 Pa. 463, 31 Atl. 202; *Grabill v. Barr*, 5 Pa. 441, 47 Am. Dec. 418; *Egbert v. Egbert*, 78 Pa. 326; *Lee's Heirs v. Lee's Exr.*, 4 McCord (S. C.), 183, 17 Am. Dec. 722; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Batterton v. State*, 52 Tex. Cr. 381, 107 S. W. 826; *Webb v. State*, 5 Tex. App. 596; *Nugent v. State*, 46 Tex. Cr. 67, 80 S. W. 84; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *State v. Kelley*, 74 Vt. 278, 52 Atl. 434; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Hotema v. United States*, 186 U. S. 413, 46 L. Ed. 1225, 22 Sup. Ct. Rep. 895; *United States v. McGlue*, 1 Curt. 1, 26 Fed. Cas. No. 15,679; *United States v. Holmes*, 1 Cliff. C. C. 98, 26 Fed. Cas. No. 15,382; *McNaughton's Case*, 10 Clarke & F. 200, 8 Eng. Reprint, 718.

sumptions at the outset of a criminal prosecution. That of innocence is with the accused—that of his sanity is with the prosecution, but with this qualification, that, whereas the presumption of innocence is active, as we have before shown, from the beginning to the end of his trial, that of sanity is dormant and unrequired until it is provoked and called for by some suggestion from either side. How such a suggestion should be disposed of rests entirely in the conscience and discretion of the court.²¹ Assuming it is evoked, can it be properly said to combat the presumption of innocence? We confess we fail to see how. Assuming its presence is announced during a trial, it is ancillary to that of innocence in this regard—that if the accused is insane then, while he may have committed the physical act charged against him, in the eye of the law he is not to be held guilty of or accountable for it. This being so, the whole contest becomes one of burden of proof—a continuation of the needless strife as to the presumptions. It has been held in a long line of cases that the burden rests on the defendant who pleads insanity to prove the insanity beyond a reasonable doubt.²² But it need hardly be argued that this view is contrary to sound principle and the weight of authority.

²¹ United States v. Chisholm, 149 Fed. 284 (it would be a reproach to justice if a guilty man escaped the penalty for a crime upon a feigned mental irresponsibility, or postponed his trial upon a feigned condition of mind, as to his inability to aid in his defense. It would be likewise a reproach to justice and our institutions if a human being, "made in God's own image," while suffering, as the old books put it, "under a visitation of God," were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law

adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity).

²² Commonwealth v. Eddy, 7 Gray (Mass.), 583; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Baccigalupo v. Commonwealth, 33 Gratt. (Va.) 807, 36 Am. Rep. 795; Lynch v. Commonwealth, 77 Pa. 205; State v. Lawrence, 57 Me. 574; People v. Coffman, 24 Cal. 230; State v. Spencer, 1 Zab. (N. J. L.) 196; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426. We have advisedly selected only a few of the cases more for identification than reference, inasmuch as the whole subject comes under review again under the heading of "Burden of Proof," § 188, *post*.

The supporters of such decisions are face to face with the proposition that if the accused is insane, how can he possibly go about the business of proving an issue, which takes all the brain power of a sane man to combat. This lamentable conflict, even unto the federal courts, may best be shown by excerpts from the opinions. In support of the proposition that the suggestion of insanity does not call upon the defendant to prove the issue, we find the late Mr. Justice Harlan says in a leading case: "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."²³ In another case,²⁴ Mr. Justice Peckham says: "We think, taking the whole charge together, that the judge properly laid down the law in regard to the responsibility of the defendant on account of his alleged mental condition. It placed the burden on the government (following *Davis v. United States*, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353) of proving beyond a reasonable-doubt that the defendant was sane at the time of the commission of the act, as one of the essential features of the crime." On the other side there is a late utterance that when "it is sought to escape the consequences of con-

²³ *Davis v. United States*, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353. Thayer calls this Mr. Justice Harlan's clear exposition: Thayer, Prel. Treat. 382.

²⁴ *Hotema v. United States*, 186 U. S. 413, 46 L. Ed. 1225, 22 Sup. Ct. Rep. 895.

tempt of court by a plea in confession and avoidance, viz., an allegation of insanity, the burden of proof is on the defendant; for every man is presumed to be sane.”²⁵ There is also the charge of Speer, J., to the jury:²⁶ “Now, the defendant, through his counsel, sets up the plea that he is not legally responsible, on account of insanity; and upon that subject the burden of proof is on the defendant. As all men, for the purposes of society, are presumed to be innocent until proved guilty, so all men are presumed to be sane until the contrary is made to appear by proof; and it logically follows that the man who insists that he is insane has upon him the burden of proof to destroy that presumption to which I have called your attention, namely, that all men are presumed to be sane until the contrary is proved.” We might go on multiplying these illustrations without end; and we have given these extracts to show how foundationless the conflict really is. Upon his plea of not guilty an accused person stands “shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot, in the very nature of things, be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing a crime.”²⁷ That this view is not inconsistent with the presumption of sanity proves itself, when it is recognized that the presumption of sanity exists, because “if it were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused.”²⁸ The discussion always leads, as we have said, to the question of burden of proof, that is to say, whether the burden is on the defendant to establish this proposition by the preponderance of evidence or whether it is incumbent

²⁵ In *re* Cashman, 168 Fed. 1008. See, also, *United States v. Chisholm*, 149 Fed. 284.

²⁶ *United States v. Ridgeway*, 31 Fed. 144.

²⁷ *Davis v. United States*, *supra*.

²⁸ *Id.*, at p. 486, 40 L. Ed. 505, 16 Sup. Ct. Rep. 353. (The plea of not guilty is unlike a special plea in a civil action, which, admitting the

case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged.) And surely the responsibility of the accused is “a fact essential to constitute the crime charged.”

on the prosecution to prove the sanity of the defendant, like other facts, beyond a reasonable doubt.²⁹ A considerable number of adjudicated cases hold that in such case the burden is upon the defendant.³⁰ It is held by the weight of authority that when evidence is given in a criminal case tending to show the insanity, the burden rests upon the state to show beyond a reasonable doubt as one of the elements of guilt that the defendant is not insane.³¹ "The *relative weight of conflicting presumptions* of law is, of course, to be determined by the court or judge—who should also direct the attention of the jury to the burden of proof as affected by the pleadings and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by the rules regulating the burden of proof and the weight of conflicting presumptions which are recognized by law and have their origin in natural equity and convenience."³² Much of the misconception both with regard to these particular presumptions of sanity and innocence and their alleged conflicts is due to the rigid ad-

²⁹ *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *State v. Trout*, 74 Iowa, 545, 7 Am. St. Rep. 499, 38 N. W. 405; *State v. Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, and note, 2 South. 854; *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Ortwein v. Commonwealth*, 76 Pa. 414, 18 Am. Rep. 420; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379. But see § 188, *post*.

³⁰ *People v. Dillon*, 8 Utah, 92, 30 Pac. 150; *Commonwealth v. Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, and note, 45 N. E. 6, 39 L. R. A. 737; *People v. Allendor*, 117 Cal. 81, 48 Pac. 1014; *Phelps v. Commonwealth*, 17

Ky. Law Rep. 706, 32 S. W. 470. See § 188, *post*.

³¹ *Davis v. United States*, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, and note, 23 N. E. 273; *Hodge v. State*, 26 Fla. 11, 7 South. 593; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Snider v. State*, 56 Neb. 309, 74 N. W. 574; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117, 19 South. 665. The New York court has held that a preponderance of evidence is sufficient: *People v. Nino*, 149 N. Y. 319, 43 N. E. 853. Nor need the defendant prove insanity beyond a reasonable doubt: *Armstrong v. State*, 27 Fla. 366, 26 Am. St. Rep. 72, 9 South. 1; *Commonwealth v. Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464. See § 188, *post*.

³² *Best, Ev.*, 10th ed., § 329.

herence to a narrow interpretation of the maxim *stabitur presumptioni donec probetur in contrarium*. This does not mean, as Thayer well puts it,³³ "that you are to stand to a presumption until the contrary is established. That may be true in particular instances. But this maxim has in it the old ambiguity as to *probatio* and *probare*; its only universal meaning is that you are to stand to the presumption until there be argument or evidence to the contrary."

§ 104 (103). **General rules as to presumptions.**—The presumptions we have discussed are those which are most frequently used. It would be hopeless to attempt any classification of the others which appear in many works and under many names. It is pleasing to know that they are truly exotic. We have Thayer's authority that they are mostly of continental origin, and one volume dealing with the subject devotes no less than two thousand three hundred columns to a disquisition which is rendered of little importance in this country by reason of our jury system.³⁴ But there are certain rules of general application which may well form the closing section of this chapter. Perhaps the most important is that presumptions must be *based upon facts* and not upon inferences or upon other presumptions.³⁵

³³ Thayer, *Prel. Treat.* 384.

³⁴ Menochius, *De Praesumptionibus, Conjecturis, Signis et Indiciis* (16 Century).

³⁵ *Danley v. Rector*, 10 Ark. 211, 227, 50 Am. Dec. 242; *Pennington v. Yell*, 11 Ark. 212, 236, 52 Am. Dec. 262; *Ward v. Metropolitan L. Ins. Co.*, 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; *Davis v. United States*, 18 App. D. C. 468. See *Terry v. Rodahan*, 79 Ga. 278, 291, 11 Am. St. Rep. 420, 5 S. E. 38; *Morris v. Indianapolis & St. L. R. R. Co.*, 10 Ill. App. 389; *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; *Carter v. State*, 172 Ind. 227, 87 N. E. 1081; *Missouri, K. & T. R. Co. v. Wilder*,

3 Ind. Ter. 85, 53 S. W. 490; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa, 121, 96 N. W. 718; *Ellis v. Ellis*, 58 Iowa, 720, 13 N. W. 65; *Atchison, T. & S. F. R. Co. v. McFarland*, 2 Kan. App. 662, 43 Pac. 788; *Chicago, R. I. & P. R. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58; *Duncan v. R. Co.*, 82 Kan. 230, 108 Pac. 101; *Collins v. Star Paper Mill Co.*, 143 Mo. App. 333, 127 S. W. 641; *Haynie v. Hammond Packing Co.*, 126 Mo. App. 88, 103 S. W. 581; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936; *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1; *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572; *Hobbs v. Blanchard*, 75 N. H. 73, 70 Atl.

The mode of arriving at a conclusion of fact by drawing inferences or by resting one presumption upon the basis of another presumption is generally, if not universally, inadmissible. Mr. Justice Strong said:³⁶ "It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. . . . No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue."³⁷ It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.³⁸ A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There must be an open and visible connection between the fact out of which the first presumption arises

1082, 18 L. R. A., N. S., 939; *Lamb v. Union R. Co.*, 195 N. Y. 260, 88 N. E. 371; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Western Union T. Co. v. Sullivan*, 82 Ohio St. 14, 137 Am. St. Rep. 754, 91 N. E. 867; *State v. Hembree*, 54 Or. 463, 103 Pac. 1008; *Douglass v. Mitchell*, 35 Pa. 440; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *McAleer v. McMurray*, 58 Pa. 126, 6 Morr. Min. Rep. 606; *Missouri Pac. R. Co. v. Porter*, 73 Tex. 304, 11 S. W. 324; *St. Louis S. R. Co. v. McIntosh* (Tex. Civ.), 126 S. W. 692; *Tull v. St. Louis etc. R. Co.* (Tex. Civ.), 87 S. W. 910; *Jones v. Ft. Worth & D. C. R. Co.*, 47 Tex. Civ. 596, 105 S. W. 1007; *Moore v. Hans-*

com (Tex. Civ.), 103 S. W. 665, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; *Richmond v. Aiken*, 25 Vt. 324; *Doolittle v. Holton*, 26 Vt. 588; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *Manning v. Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761. See *United States v. Carr*, 132 U. S. 644, 33 L. Ed. 483, 10 Sup. Ct. Rep. 182; *Rex v. Burdett*, 4 Barn. & Ald. 314, 106 Eng. Reprint, 952, 6 Eng. Com. L. 431; *Wheelton v. Hardisty*, 8 El. & Bl. 332, 120 Eng. Reprint, 86; *Missouri etc. R. Co. v. Foreman*, 174 Fed. 377, 98 C. C. A. 281.

³⁶ *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

³⁷ *Starkie on Ev.*, p. 80.

³⁸ *Best on Ev.*, p. 95.

and the fact sought to be established by the dependent presumption.³⁹ In other words, although from proof of the fact A, the fact B may be presumed, and from proof of the fact B, the fact C may be presumed, it does not at all follow that from proof of the fact A producing the presumption of B, the fact C may be presumed, because fact C is dependent upon the *proof* of fact B, and presumption is clearly not proof. Nowhere is the presumption held to be a substitute for proof of an independent and material fact.⁴⁰ The marshaling of various circumstances with each other and with the fact to be proved must not be confused with

³⁹ *Douglass v. Mitchell's Exr.*, 35 Pa. 440. (This case affords a remarkable illustration of the worthlessness of presumptions dependent on other presumptions. Mitchell, says the plaintiff in error, passed a title derived through Douglass, without noticing the nonjoinder of his wife. It is inferred that he would not have done so, with knowledge that Douglass had a wife, from the fact that he was a careful conveyancer. From this inference, it is next presumed, he did not know Douglass had a wife, and therefore did not know Douglass, and therefore could have lent him no money. But, without noticing the attempted subsequent inferences, who does not see that the inference is quite as strong, and even stronger, that he was not a careful conveyancer; for if he had been, he would necessarily have inquired whether the grantor was married or single.)

⁴⁰ *United States v. Ross*, *supra*, followed in *Cunard S. S. Co. v. Kelley*, 126 Fed. 615, 61 C. C. A. 532; *State v. Phillips*, 118 Iowa, 677, 92 N. W. 876; *Moore v. Renick*, 95 Mo. App. 211, 68 S. W. 939; *Deschenes v. Concord etc. R. R.*, 69 N. H. 290, 46 Atl. 469; *Dame v. Car Works*, 71 N. H. 408, 52 Atl. 864; *Cohn v. Saidel*, 71 N. H. 568, 53 Atl. 805. Where it was claimed that an injury resulting in the death of the insured consisted of

a strain received while carrying a box of ashes and cinders, the jury may be warranted in inferring that the deceased lifted and carried out such box, if it appears that it was his duty to have done so, that he was in the habit of doing so every evening, that on the evening when he was claimed to have been injured he was seen shoveling ashes and cinders into a wooden box in which he usually carried them, that they were actually carried out by some person on that evening, and that during the same evening he complained of pain in the lower part of the abdomen, which continued to increase until he died, and the physicians attending upon him all testified that his condition was the result of some strain or external violence; but this evidence does not warrant the further presumption that from his carrying out of the box a strain resulted, and that this in turn was the cause of his death: *Globe Accident Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563. If presumption could rest on presumption, would it not be equally sound to say that as he had always theretofore carried out the box of ashes safely, there was a presumption that he did so safely on that occasion, and therefore another presumption could be built upon that that he must have received the injury elsewhere?

the idea that the inference as to each is interdependent. There must be the connection referred to between them. Once the facts are established from which the presumptions may be legitimately drawn, it is the province of the jury to deduce the presumption or inference of fact.⁴¹ If the connection is too remote or uncertain, it is the duty of the court either to exclude the testimony from which the presumption is sought to be deduced, or to instruct the jury that the evidence affords no proper foundation for any presumption.⁴² If, however, the facts are clearly established, forming a proper basis for a presumption of law, the *jury has no right to disregard* the presumption which the law raises. The presumption in such case is one deriving its force from the law and not merely from processes of reasoning.⁴³ Since presumptions of law are of a nature to exclude all contrary proof, the court will not suffer the jury to disregard them. Presumptions of fact are founded in experience, and may be raised or not as the jury may determine. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by law, but should direct them that from the evidence it is their province to determine whether they will raise the presumption or not. The jury, looking to the bench for the law, would naturally take it that a declaration was binding and left them no discretion. Where the facts are before the jury, the presumptions or inferences they warrant are questions purely for them. Where presumptions of fact founded in experience and in the usual course of the dealings of men are not repelled by contrary evidence, they should be respected by juries, and they have no power arbitrarily to reject them. They must stand until they are overthrown by contrary proof.⁴⁴ When a disputable presumption has been met by proofs and the burden shifted, the conflicting evidence is to be weighed and the verdict rendered, in civil

⁴¹ See *Ham v. Barrett*, 28 Mo. 388.

⁴² *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *Philadelphia Passenger Ry.*

Co. v. Henrice, 92 Pa. 431, 37 Am. Rep. 699.

⁴³ *Ham v. Barrett*, 28 Mo. 388.

⁴⁴ *Ham v. Barrett*, *supra*; *Best on Presumptions*, 46, 51.

cases, in favor of the party whose proofs have most weight; and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must be regarded only from the standpoint of logic and reason and valued and given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption.⁴⁵

⁴⁵ *Graves v. Colwell*, 90 Ill. 612.

CHAPTER 4.

JUDICIAL NOTICE.

- § 105. Meaning of the Term.
- § 105a. Principle on Which Based.
- § 106. Existence of Domestic Governments.
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- § 110. Subordinate Officers in Other States.
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- § 112. Law of the Forum—The Constitution of the United States—Acts of Congress.
- § 112a. Same—International Law—Treaties.
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- § 113. What are Public Statutes—Trend of Judicial Legislation.
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- § 114. Bank and Railway Charters.
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- § 117. Character and Existence of Statutes—Questions for the Court.
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- § 120. Federal Courts—State Statutes.
- § 121. The Unwritten Law.
- § 122. Executive Proclamations—Regulation of Bureaus—Official Reports of Public Officers.
- § 122a. Military Orders.
- § 123. Customs and Modes of Business.
- § 123a. Same—Illustrations.
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- § 127. Geographical Features.
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- § 128. Matters of Science and Art—Patents—Games and Gaming.
- § 128a. Statistics—Nature and Qualities of Common Substances.
- § 129. Invariable Course of Nature—Time—Course of Seasons—Duration of Life—Instincts.
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- § 130. Meaning of Words and Phrases—Slang and Slander—The Scriptures.
- § 131. Abbreviations.
- § 132. Facts not Within the Knowledge or Memory of the Judge—Doubtful Cases.
- § 133. Facts of Which the Judge has Special Knowledge.
- § 134. Facts of Which Jurors Take “Judicial” Notice.
- § 134a. Pleading—Proof and Procedure in Respect to Facts to be Judicially Noticed.

§ 105 (104). Meaning of the term.—When a cause is presented at the bar for trial, the court and jury are presumed to be uninformed concerning the facts involved in the case, and it is incumbent upon the litigant parties to establish by evidence the facts relied upon by them respectively. There is, however, a large class of facts which need not be proved, since they are “judicially noticed” by the court and jury. That is to say, there are a great many things of such common knowledge that the courts ought to be presumed to know them,—such as the Declaration of Independence; the earthquake and great fire of San Francisco in 1906, and other matters of past history; the existence and procedure of their own court; the public laws; the calendar; the public mortality tables; treaties entered into by their own government, and many other matters of such general notoriety that every well-informed man or woman within the limits of the court’s jurisdiction must or should know.¹

¹ *Salomon v. State*, 28 Ala. 83; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *South & N. A. R. Co. v. Wood*, 74 Ala. 449, 49 Am. Rep. 819; *Highland Avenue & Belt Line R. Co. v. Walters*, 91 Ala. 435, 8 South. 357; *Brumagim v. Bradshaw*, 39 Cal. 24; *Baker v. Hope*, 49 Cal. 598; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *Griffith v. Denver Con. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, 48; *Wordin’s Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219, 42 Atl. 659; *Kile v. Town of Yellow-*

head, 80 Ill. 208; *Gunning v. People*, 86 Ill. App. 676; *Doyle v. Village of Bradford*, 90 Ill. 416; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538; *Jamieson v. Indiana Nat. Gas Co.*, 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76; *State v. Braskamp*, 87 Iowa, 588, 54 N. W. 532; *State v. Brooks*, 8 Kan. App. 344, 56 Pac. 1127; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658; *Yoree v. Vicksburg S. & P. R. Co.*, 110 La. 791, 34 South. 779; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325; *Gaynor v. Old Colony*

It will be readily appreciable that while the subjects of judicial cognizance are so numerous and so varied, it would be next to impossible to classify them, or to say further than that they embrace subjects "judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters, arising in the ordinary course of nature, or the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition."² If it so happened that the proof of any of such facts formed part of a litigant's case, he is excused from proving them, as it is said the court will take judicial cognizance of their ex-

& N. R. Co., 100 Mass. 208, 97 Am. Dec. 96; Georgia Pac. R. Co. v. Baird, 76 Miss. 521, 24 South. 195; Spengler v. Williams, 67 Miss. 1, 6 South. 613; State v. Lingle, 128 Mo. 528, 31 S. W. 20; Poor v. Watson, 92 Mo. App. 89; Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; State v. Boyd, 34 Neb. 435, 51 N. W. 964; Hall v. Brown, 58 N. H. 93; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; Cohn v. Kahn, 14 Misc. Rep. 255, 35 N. Y. Supp. 829; Smith v. New York C. R. Co., 43 Barb. (N. Y.) 225; Howard v. Moot, 64 N. Y. 262; People v. Snyder, 41 N. Y. 397; Rauch v. Commonwealth, 78 Pa. 490; Austin v. State, 101 Tenn. 563, 70 Am. St. Rep. 703, 50 L. R. A. 478, 48 S. W. 305; Missouri Pac. R. Co. v. Graves, 2 Tex. App. Civ. Cas., §§ 676, 679; State v. Bates, 22 Utah, 65, 83 Am. St. Rep. 768, 61 Pac. 905; Gove v. Downer, 59 Vt. 139, 7 Atl. 463; Richmond & Union Pass. R. Co. v. Richmond, F. & P. R. Co., 96 Va. 670, 32 S. E. 787; Mullen v. Sackett, 14 Wash. 100, 44 Pac. 136; The Mary, 123 Fed. 609; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; United States v. Rio Grande D. & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Minnesota v. Barber, 136 U. S. 313, 321, 34 L. Ed. 455, 10 Sup. Ct. Rep. 862; Queen

v. Aspinwall, L. R. 2 Q. B. Div. 48, 61.

² Wade on Notice, § 1403. And, as a common knowledge of man ranges far and wide, so the doctrine embraces matters so curiously diverse as, e. g., the rising of the sun, the status of the Isle of Cuba, the late Civil War, the contents of the Bible, the character of a camp-meeting, the height of the human frame, the fable of "the frozen snake," the characteristics and construction of the ice-cream freezer, the general use of the diamond stack or the straight stack spark-arrester, the habits of those who shave; in fine, "all things, both great and small": Case v. Perew, 46 Hun (N. Y.), 57; People v. D'Argencour, 32 Hun (N. Y.), 178; Swinerton v. Insurance Co., 37 N. Y. 174, 93 Am. Dec. 560; State v. School Dist., 76 Wis. 177, 20 Am. St. Rep. 41, 7 L. R. A. 330, 44 N. W. 967; Hunter v. Railroad Co., *supra*; Brown v. Piper, *supra*; Hoare v. Silverlock, 12 Q. B. 624, 116 Eng. Reprint, 1004; Frace v. Railroad Co., 143 N. Y. 182, 187, 38 N. E. 102; Petit v. Minnesota, 177 U. S. 164, 44 L. Ed. 716, 20 Sup. Ct. Rep. 666; Reid v. McWhinnie, 27 U. C. R. 289 (weights and measures); Girdlestone v. O'Reilly, 21 U. C. R. 409 (rate of interest).

istence, or, in other words, they will be taken as proved. And the importance of the subject of judicial notice can hardly be overestimated, for there is no case in which there are not some matters which fall within the judicial cognizance of the tribunal before which it is tried, since the very law itself which is administered by the forum is a subject of judicial notice. It will be seen from the illustrations given in this chapter, that there is a great variety of facts which may be safely assumed to be within the knowledge of the court, and which therefore need not be maintained by evidence. "The maxim that what is known need not be proved, *manifesta* (or *notoria*) *non indigent probatione*, may be traced far back in the civil and the canon law; indeed, it is probably coeval with legal procedure itself. We find it as a maxim in our own books, and it is applied in every part of our law. It is qualified by another principle, also very old, and often overtopping the former in its importance,—*non refert quid notum sit judici, si notum non sit in forma judicii*. These two maxims seem to intimate the whole doctrine of judicial notice."³ Of such facts the court is said to take *judicial notice*. General rules have often been prescribed for determining what facts are, and what are not, matters for judicial cognizance, yet such rules are necessarily too vague and general in their character to afford very valuable aid to the practitioner. Certain facts may be said to be the subject of judicial notice because they are part of the *law of the land*, which is presumed to be generally known. Other facts may be properly the subject of judicial notice, because they relate to the organization and *duties of the court* and its officers, and hence may be said to be peculiarly within the cognizance of the judge. But when we pass

³ Thayer, Prel. Treat. on Ev. at Com. Law, p. 277. Thayer says that the term "take judicial notice" owes its origin to old English usage, where it appears as take notice, take knowledge and take consance. He illustrates it by two Biblical references, "Wherefore have we afflicted our souls and Thou takest no knowledge"

(Isa. lviii, 3), and "They took knowledge of them that they had been with Jesus" (Acts iv, 13). It is to be found also in "That Thou shouldst take knowledge of me" (Ruth ii, 10), "Blessed be he that did take knowledge of Thee" (Ruth ii, 19), "Take knowledge of all the lurking places" (1 Sam. xxiii, 23).

from facts of the character already mentioned, the principal guide in determining what facts may be assumed to be judicially known is that of *notoriety*; and it is clear, especially in the realm of science and the arts, that the circle of facts within the range of common knowledge is constantly extending. In the early text-books on evidence a few paragraphs sufficed to enumerate the facts of which the courts then assumed to take judicial notice; but in the exercise of their discretion, as individual cases have arisen, it will be seen that judges have dispensed with proof of so large a variety of facts that the state of the law on the subject can only be shown by numerous illustrations from the decided cases.⁴ In the states which have adopted codes an attempt has been made to classify those subjects of which the courts are to take judicial notice.⁵

⁴ *Matter of Viemeister*, 179 N. Y. 235, 103 Am. St. Rep. 859, 1 Ann. Cas. 334, 70 L. R. A. 796, 72 N. E. 97. See interesting sketch of the growth of the rule, Thayer's *Prel. Treatise of Ev. at Com. Law*, p. 277; also article on "Judicial Notice and Law of Evidence," 3 *Harv. Law Rev.* 285, by the same author. For exhaustive notes, see *Lanfear v. Mestier*, 89 Am. Dec. 663, 694; *Temple v. State*, 49 Am. Rep. 201-207; *Green v. Lineville Drug Co.*, 124 Am. St. Rep. 20, and *Olive v. State*, 4 L. R. A. 33. It is not prejudicial error if the court admits evidence of facts of which it takes notice: *Wabash R. Co. v. Campbell*, 219 Ill. 312, 3 L. R. A., N. S., 1092, 76 N. E. 346. In the useful little volume published by J. J. McKelvey, of the New York Bar, he puts it in these words: "The doctrine of judicial notice is that there are certain facts of which the court will not require evidence, because they are so well known, so easily ascertainable, or so related to the official character of the court, that it would not be good sense to do so."

⁵ The California Code of Civil Procedure, sections 1875 and 2102, which may be taken as a type of the others, is as follows: "§ 1875. Courts take judicial notice of the following facts: 1. The true signification of all English words and phrases, and of all legal expressions; 2. Whatever is established by law; 3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States; 4. The seals of all the courts of this state and of the United States; 5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States; 6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States; 7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public; 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court

§ 105a (104). Principle on which based.—A little inquiry into the foundation which carries so useful a structure, and so great a time-saver in our process of legal examinations, cannot fail to be of ultimate service. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of everyone has never been questioned. This is the principle upon which the doctrine of judicial notice rests; convenience and expediency, and the saving of the time, trouble and expense which would be lost in establishing in the ordinary way facts which do not admit of contradiction. There is, however, no rule of any practical importance which governs every phase of the subject; and each new question when it arises must be decided by the court with no other guidance, outside of analogous precedents, than the general law applicable to the whole subject, which is, in the words of Greenleaf: "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."⁶ This rule enumerates three material requisites: 1. The matter of which a court will take judicial notice must be a matter of common and general knowledge, not merely the knowledge of specialists or experts; 2. It

may resort for its aid to appropriate books or documents of reference."

"§ 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it." In Reynolds' Trial Evidence the author, in his usual concise manner, says that the two exceptions to the rule requiring all facts to be proven on a trial are "facts of which the courts take judicial notice or recog-

nize as within their own knowledge, without requiring any extrinsic proof thereof; and the second being as to such facts as are admitted by both sides"· § 55.

⁶ 1 Greenl. Ev., § 6; Salomon v. State, 28 Ala. 83; Brumagim v. Bradshaw, 39 Cal. 40; People v. Snyder, 41 N. Y. 397; Ho Ah Kow v. Nunan, 5 Saw. 552, 560, Fed. Cas. No. 6546; Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; King v. Gallun, 109 U. S. 99, 27 L. Ed. 870, 3 Sup. Ct. Rep. 85; Lanfear v. Mestier, 18 La. Ann. 497, 89 Am. Dec. 658, to the excellent monographic note wherein by the late A. C. Freeman we are indebted for much of the matter in this section.

must be "known," that is, well-established and authoritatively settled, not doubtful or uncertain; and 3. It must be known "within the limits of the jurisdiction of the court," since, for example, foreign laws are not judicially noticed. Furthermore, the mere personal knowledge of the judge is not the judicial knowledge of the court; judicial cognizance is taken of those matters only that are "commonly" known; and therefore the individual and extra-judicial knowledge of the court that some of the parties are dead, or that the defendant is a resident of another state, will not dispense with proof of those facts, and cannot be resorted to for the purpose of supplementing the record.⁷ And, on the other hand, it is not essential that matters of judicial cognizance be actually known to the judge. If they are proper subjects of judicial knowledge, the judge may inform himself in any way which may seem best to his discretion, and act accordingly. The mere incident that the judge himself does not know the fact will not prevent the judge *qua* court taking notice of it. The court may obtain the information by investigation. It is easy to understand a party asking the court to take judicial notice of a fact, and that the judge should reply that he himself did not know it, but that if he ought to know it by reason of its notoriety, then he would take the judicial cognizance of it. It would be absurd to suppose any judge to know all that was in an encyclopedia or dictionary, and the court will only take the official cognizance of such things mentioned in those books as are the subjects of general knowledge.⁸

⁷ Wheeler v. Webster, 1 E. D. Smith (N. Y.), 1; State v. Edwards, 19 Mo. 674; Mayor etc. of New Orleans v. Ripley, 5 La. 121, 25 Am. Dec. 175.

⁸ 1 Greenl. Ev., § 6; United States v. Teschmaker, 22 How. (U. S.) 392, 16 L. Ed. 353; Wagner's Case, 61 Me. 178; McKinnon v. Bliss, 21 N. Y. 206; The Charkieh, 42 L. J. Adm. 17; Taylor on Evidence, § 21; and see the note to Ashworth v. Kittridge, 12 Cush. (Mass.) 193, 59 Am. Dec. 185-187, upon the admissibility of

books containing statistics and the like; State v. Stearns, 72 Minn. 200, 219, 75 N. W. 210; People v. Mayes, 113 Cal. 618, 45 Pac. 860; The Montello, 11 Wall. (U. S.) 411, 20 L. Ed. 191; Hoyt v. Russell, 117 U. S. 401, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881; Taylor v. Barclay, 2 Sim. 213, 57 Eng. Reprint, 769; Hoyt v. Russell, 117 U. S. 401, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881; Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049; Kaolatype Engraving Co. v. Hoke (C. C.), 30 Fed. 444; Town of North

§ 106 (105). **Existence of domestic governments.**—The first in order of those facts which the courts judicially notice is naturally that of their own artificial and legal existence, that is to say, they recognize the source from which they derive their jurisdiction. The proposition that courts must recognize the existence of the governments to which they owe their power is so obvious as to require little illustration or discussion. This implies also knowledge of the principal departments of government and of their respective powers and duties. They are bound to take judicial notice of the doings of the executive and legislative departments of the government, when called upon by proper authorities to pass upon their validity, and are bound to take judicial notice of historical facts, matters of public notoriety and interest passing in our midst. These views are in full accord with the decisions of our highest tribunals. Greenleaf says⁹ that courts “will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers, and actions. Thus, notice is taken, by all tribunals, of the accession of the chief executive of the nation or state, under what authority he acts; his powers and privileges, etc., . . . the sittings of the legislature and its established and usual course of proceedings.”¹⁰ “The recognition by courts of the international relations of their own country, of the great seal, of the names and official signatures and public acts of high public officials, past and present, and the like, may come under this head. The administration of justice is carried on by the sovereign. The sovereign, in the lapse of time, has lost something of his concreteness, where he has not lost it all; but when the king, long ago, sat personally in court, and, in later times, when judicial officers were, in a true and lively sense, the

Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. Supp. 867; Ball v. Flora, 26 App. D. C. 394.

⁹ 1 Greenl. Ev., § 6.

¹⁰ Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Swinnerton v. Colum-

bian Ins. Co., 37 N. Y. 188, 93 Am. Dec. 560; Millikin v. Dotson, 117 App. Div. 527, 102 N. Y. Supp. 564 (that the District of Columbia is the seat of government); State v. Minnick, 15 Iowa, 123.

representatives and even mere deputies of the king, it was an obvious and easily intelligible thing that courts should notice without evidence whatever the king himself knew or did, in the exercise of any of his official functions, whether directly or through other high officers. The same usages of the courts have continued, under the prevalence of legal and political theories very different indeed from those just mentioned; and it is not to be wished that these usages should change."¹¹ The courts also are bound to take notice of the political and social conditions of the country which they judicially rule.¹² Thus the courts require no proof of the time of sessions of parliament, or of Congress, or of state legislatures, or of the privileges of members and the usual course of proceedings therein,¹³ or of the

¹¹ Thayer, *Prel. Treat. on Ev. at Common Law*, p. 299; *Wells v. Jackson Co.*, 47 N. H. 235, 90 Am. Dec. 575.

¹² *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178. So on matters of public policy: *Hall v. O'Neil Turpentine Co.*, 56 Fla. 324, 16 Ann. Cas. 738, 47 South. 609. Of war: *Rex v. De Berenger*, 3 M. & S. 67, 15 R. R. 415; *Alcenius v. Nygren*, 4 El. & Bl. 217, 24 L. J. Q. B. 19, 1 Jur., N. S., 16, 3 W. R. 25.

¹³ *Lake v. King*, 1 Saund. 131, 85 Eng. Reprint, 137; *Birt v. Rothwell*, 1 Ld. Raym. 210, 343, 91 Eng. Reprint, 1036, 1125; *Rex v. Wilde*, 1 Lev. 296, 83 Eng. Reprint, 100; *Case of Sheriff of Middlesex*, 11 Adol. & El. 273, 113 Eng. Reprint, 419; *Cassidy v. Steuart*, 2 Man. & G. 437. But courts do not take judicial notice of the privilege granted to legislators exempting them from arrest and service of process: *State v. Polacheck*, 101 Wis. 427, 77 N. W. 708. Judicial notice does not extend, however, to the course of legislation or the contents of the journals. "We are not presumed to know the facts which transpire in the progress of a

bill through the two houses of the General Assembly. Courts will sometimes, in aid of exposition, look to the reasons for enacting the law. But if, upon the suggestion of such error as is here assigned, we were in duty bound to explore the journals of the two houses to ascertain whether every step required by the constitution had been taken, the labor imposed would be endless. Besides, something is to be presumed in favor of the action of the legislature": *Coleman v. Dobbins*, 8 Ind. 156; 1 Greenl. Ev., § 10. The courts are not all agreed upon the question of journals of the legislature. In Alabama, Kansas, Illinois, and Michigan the courts have the right, and it is their duty, to notice judicially the journals of the two houses of the legislature in determining whether all the constitutional requisites to the validity of a statute have been complied with: *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Division of Howard County*, 15 Kan. 194; *Grob v. Cushman*, 45 Ill. 119; *People v. Mahaney*, 13 Mich. 481. In Indiana and Kentucky, however, this rule is not accepted: *Coleman v. Dobbins*, *supra*; *Auditor v. Haycraft*, 14 Bush (Ky.),

numbers of the constituent members.¹⁴ The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. The lower courts of the United States, and the supreme court, on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union.¹⁵ Taking judicial notice of the constitution and laws of the state, the supreme court must take judicial notice of the days of public general elections of members of the legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect.¹⁶

284. And in Michigan, the courts are not bound to take judicial notice of the facts attending the election of the several members of the legislature, even after those facts have been spread upon the legislative journals: *People v. Mahaney*, 13 Mich. 481. The English courts also decline to notice judicially the journals of Parliament, which are denied the dignity of records: *King v. Arundel*, Hob. 109, 80 Eng. Reprint, 258; though they do notice the privilege of the House of Commons: *Stockdale v. Hansard*, 9 Ad. & El. 107, 112 Eng. Reprint, 1112; *S. C.*, 4 Jur. 70; 3 *Perry & D.* 330; *Burdett v. Abbot*, 5 Dow. 165, 3 Eng. Reprint, 1289, 14 East, 1, 3 Eng. Reprint, 501; *Burdett v. Colman*, 14 East, 163, 104 Eng. Reprint, 563.

¹⁴ *State v. Mason*, 155 Mo. 486, 55 S. W. 636.

¹⁵ *Owings v. Hull*, 34 U. S. (9 Pet.) 607, 625, 9 L. Ed. 246, 252; *Lamar v. Micou*, 112 U. S. 452, 474, 28 L. Ed. 751, 759, 5 Sup. Ct. Rep. 221, and 114 U. S. 218, 223, 29 L. Ed. 94, 95, 5 Sup. Ct. Rep. 857; *Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, 537, 6 Sup. Ct. Rep. 242; *Fourth Nat. Bank of New York v. Francklyn*, 120 U. S. 747, 751, 30

L. Ed. 825, 827, 7 Sup. Ct. Rep. 757; *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086, 11 Sup. Ct. Rep. 453; *Martin v. Baltimore & O. R. Co.* ("*Gerling v. Baltimore & O. R. Co.*"), 151 U. S. 673, 678, 38 L. Ed. 311, 313, 14 Sup. Ct. Rep. 533.

¹⁶ *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132; *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200, 201; *Gardner v. Barney*, 73 U. S. (6 Wall.) 499, 18 L. Ed. 890; *Hoyt v. Russell*, 117 U. S. 401, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881; *Jones v. United States*, 137 U. S. 202, 216, 34 L. Ed. 691, 697, 11 Sup. Ct. Rep. 80; *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120; *Coleman v. Dobbins*, 8 Ind. 156; *State v. Patterson*, 116 Ind. 45, 49, 10 N. E. 289, 18 N. E. 270; *Urmston v. State*, 73 Ind. 175; *Davis v. Best*, 2 Iowa, 96; *State v. Minnick*, 15 Iowa, 123; *Ellis v. Reddin*, 12 Kan. 306; *Whitman v. State*, 80 Md. 410, 31 Atl. 325; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *Jackson Co. v. Arnold*, 135 Mo. 207, 36 S. W. 662; *Kokes v. State*, 55 Neb. 691, 76 N. W. 467; *Rice v. Mead*, 22 How. Pr. (N. Y.) 445; *Steinbeger v. State*, 35 Tex. Cr. 492, 34 S. W. 617; *Hizer v. State*, 12 Ind. 330; *Wampler v. State*, 148 Ind. 557,

When two legislatures claim the power to act, the courts will recognize the lawful one.¹⁷

§ 107 (105, 106). Existence of foreign governments.—While the courts will take judicial notice of the existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the home government. The courts will not anticipate the action of the government in this respect; and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change.¹⁸ Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and

38 L. R. A. 829, 47 N. E. 1068; Martin v. Aultman, 80 Wis. 150, 49 N. W. 749; United States v. Morrissey, 32 Fed. 147; State v. Custer, 28 R. I. 222, 66 Atl. 306.

¹⁷ When different bodies of men, each claiming to be, and to exercise the functions of, the legislative department of the state appear, each asserting their title to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. There can be but one lawful legislature. The court must know, for itself, whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways, it becomes essential that the court

should forthwith ascertain, and take judicial cognizance of, the question, Which is the true legislature? From questions submitted by Governor Garcelon in 1879 and answers of the justices of the supreme judicial court thereto, 70 Me. 560, 609. To the same general effect are the cases of Foscue v. Lyon, 55 Ala. 440; Turner v. Patton, 49 Ala. 406; Ashley v. Martin, 50 Ala. 537; Smith v. Speed, 50 Ala. 276; Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783; Andrews v. Knox Co., 70 Ill. 65; Division of Howard Co., 15 Kan. 194; State v. Kennard, 25 La. Ann. 238; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Douthitt v. Stinson, 63 Mo. 268; Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; Killebrew v. Murphy, 3 Heisk. (Tenn.) 546; Cuyler v. Ferrill, 1 Abb. (U. S.) 169, Fed. Cas. No. 3523.

¹⁸ City of Berne v. Bank, 9 Ves. 347, 32 Eng. Reprint, 636; Taylor v. Barclay, 2 Sim. 213, 57 Eng. Reprint, 769; United States v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471; The Estrella, 4 Wheat. (U. S.) 298, 4 L. Ed. 574.

executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by the supreme court of the United States, and has been affirmed under a great variety of circumstances.¹⁹ All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings.²⁰ But it is the duty of the judge to take notice whether a foreign power has been recognized by the government or not,²¹ and to judicially

¹⁹ *Gelston v. Hoyt*, 16 U. S. (3 Wheat.) 246, 324, 4 L. Ed. 381, 401; *United States v. Palmer*, 16 U. S. 610, 4 L. Ed. 471; *The Divina Pastora*, 17 U. S. (4 Wheat.) 52, 4 L. Ed. 512; *Foster v. Neilson*, 27 U. S. (2 Pet.) 253, 307, 309, 7 L. Ed. 415, 433, 434; *Keene v. McDonough*, 33 U. S. (8 Pet.) 308, 8 L. Ed. 955; *Garcia v. Lee*, 37 U. S. (12 Pet.) 511, 520, 9 L. Ed. 1176; *Williams v. Suffolk Ins. Co.*, 38 U. S. (13 Pet.) 415, 10 L. Ed. 226; *United States v. Yorba*, 68 U. S. (1 Wall.) 412, 423, 17 L. Ed. 635, 637; *United States v. Lynde*, 78 U. S. (11 Wall.) 632, 638, 20 L. Ed. 230, 232; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 456, 18 Sup. Ct. Rep. 83; *Foster v. Globe Venture Syndicate*, 1 Ch. 811, 69 L. J. Ch. 372. It is equally well settled in England: *The Pelican*, Edw. Adm., Appx. D; *Taylor v. Barclay*, 2 Sim. 213, 57 Eng. Reprint, 769; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 221, 233, 45 Eng. Reprint, 861; *Republic of Peru v. Peruvian Guano Co.*, L. R. 36 Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, L. R. 38 Ch. Div. 348, 356, 359.

²⁰ *United States v. Reynes*, 50 U. S. (9 How.) 127, 13 L. Ed. 74; *Kennett v. Chambers*, 55 U. S. (14 How.) 38, 14 L. Ed. 316; *Hoyt v. Russell*, 117 U. S. 401, 404, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881; *Coffee v. Groover*, 123 U. S. 1, 31 L. Ed. 51, 8 Sup. Ct. Rep. 1; *State v. Dunwell*, 3 R. I. 127; *State v. Wagner*, 61 Me. 178; *Taylor v. Barclay*, and *Emperor of Austria v. Day*, above cited; 1 *Greenl. Ev.*, § 6; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 456, 18 Sup. Ct. Rep. 83; *Schoerken v. Swift, Courtney & Becher Co.*, 7 Fed. 469; *Lumley v. Wabash R. Co.*, 71 Fed. 21.

²¹ *Taylor v. Barclay*, 2 Sim. 213, 57 Eng. Reprint, 769; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 456, 18 Sup. Ct. Rep. 83. In *Dolder v. Bank of England*, 10 Ves. Jr. 352, 32 Eng. Reprint, 881, the fact of all parties not being before the court prevented the Lord Chancellor expressing more fully his views. He said: "Some perplexity arises from what we know and what we can only know judicially. I cannot affect to be ignorant of the fact, that the revo-

notice the relations between this and other countries.²² When the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department. And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.²³

§ 107a (105, 106). Same — Flags — Seals of State—**Foreign war.**—It follows, of course, that the recognition of the existence of foreign governments is extended beyond the mere diplomatic acknowledgment of their being, and that so soon as the executive assent is made public, the courts not only recognize foreign states and sovereigns acknowledged as such by the home governments of such courts, but also their symbols of authority, such as *national flags and seals of state*.²⁴ The public seals of such foreign states are of such public notoriety that no proof of them is required. They import absolute verity;²⁵ and when at-

tentions in Switzerland have not been recognized by the government of this country; but as a judge I cannot take notice of that." This is parallel with the law here, that until recognition by the domestic government the courts cannot take judicial notice of the changes of the ruling powers in foreign countries.

²² Neeley v. Henkel, 180 U. S. 109, 45 L. Ed. 448, 21 Sup. Ct. Rep. 302.

²³ Williams v. Suffolk Ins. Co., 38 U. S. (13 Pet.) 415, 10 L. Ed. 226.

²⁴ Greenl. Ev., § 8. In Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404, the court took judicial notice that the province of Upper Canada is a foreign government, and that it has courts and that those courts pro-

ceed according to the course of the common law Chicago Co. v. Keegan, 152 Ill. 413, 39 N. E. 33. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States will be recognized by every court in the Union without proof, as these are matters of common knowledge and international law: 1 Greenl. Ev., § 4. But the seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself: The Estrella, 4 Wheat. (U. S.) 298, 4 L. Ed. 574.

²⁵ Coit v. Milliken, 1 Denio (N. Y.), 376; 4 Cowen & Hill's Notes to Phill. Ev., p. 281.

tached to foreign judgments such judgments are sufficiently authenticated.²⁶ An authentication of a foreign record by the certificate of the clerk and the presiding judge, aided by "a certificate, under the great seal of the state, of the official character of the judge," is sufficient to entitle it to be received in evidence.²⁷ And the rule generally prevailing in the United States is, that "a foreign judgment may be proved by a copy thereof, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy. The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature, and by the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself."²⁸ In like manner no proof need be given of the seals of foreign maritime and admiralty courts. By common consent and general usage, the seal of a court of admiralty has been considered as sufficiently authenticating its records. No objection has prevailed against the reception of the decree of a court acting on the law of nations, when established by its seal. The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party. For any higher evidence of the fact appearing upon the face of the record than the seal itself imports is impossible, and to require extrinsic evidence of it would be to subvert the rule itself, that a national seal is the highest proof of authenticity. These remarks are applicable to the seal of

²⁶ *Church v. Hubbard*, 2 Cranch (U. S.), 187, 2 L. Ed. 249.

²⁷ *Watson v. Walker*, 23 N. H. 471; *Spaulding v. Vincent*, 24 Vt. 501; *Griswold v. Pitcairn*, 2 Conn. 85; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Stewart v. Swanzy*, 23 Miss. 502.

²⁸ *Gunn v. Peakes*, 36 Minn. 177,

1 Am. St. Rep. 661, 30 N. W. 466; *Mahurin v. Bickford*, 6 N. H. 567; *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Knox v. Silloway*, 10 Me. 201; *Vose v. Manly*, 19 Me. 331; *Brooks v. Daniels*, 22 Pick. (Mass.) 498; *Day v. Moore*, 13 Gray (Mass.), 522. See *Freeman on Judgments*, 4th ed., § 414.

a court of admiralty, and for this obvious reason, because, equally with a national seal, it proves itself.²⁹ The courts take judicial notice of wars with foreign states if a *state of war* has been declared by the proper authorities;³⁰ but if no such declaration has been made, the fact of a state of war is one to be proved.³¹ A war between foreign powers is not judicially noticed.³² When it is said, however, that the courts take judicial notice of wars with foreign states, it must be interpreted that the courts take judicial notice of the act of their own executive with reference to war with a foreign state. The executive recognition is the warrant for the court.³³ It is the determination of a political question by another department of the government which is binding on the judges.³⁴

§ 108 (107). Territorial extent and subdivisions—Counties—Towns—Cities, etc.—English rule.—Next in order of importance to the recognition by the courts of their sources of power comes the extent of territory over which that power may be exercised, and as the territorial extent of the nation and of the several states and the division of the states into towns, counties and other civil divisions are generally regulated by public laws and are matters of general notoriety, on both of these grounds the courts do not require proof of such facts. “All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the plead-

²⁹ *Croudson v. Leonard*, 4 Cranch (U. S.), 435, 2 L. Ed. 670; *Rose v. Himely*, 4 Cranch (U. S.), 292, 2 L. Ed. 608; *Yeaton v. Fry*, 5 Cranch (U. S.), 335, 3 L. Ed. 117; *Church v. Hubbard*, 2 Cranch (U. S.), 187, 2 L. Ed. 249; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Green v. Waller*, 2 Ld. Raym. 891, 92 Eng. Reprint, 96.

³⁰ *Dolder v. Lord Huntingfield*, 11

Ves. 292, 32 Eng. Reprint, 1097; *Rex v. De Berenger*, 3 Maule & S. 67, 105 Eng. Reprint, 536; *Tayl. Ev.*, § 18.

³¹ 1 Hale P. C. 164.

³² *Dolder v. Lord Huntingfield*, 11 *Ves.* 292, 32 Eng. Reprint, 1097.

³³ *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. Ed. 381.

³⁴ *Jones v. United States*, 137 U. S. 214, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80.

ings.”³⁵ In England the courts “notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and the local divisions of the country as states, provinces, counties, cities, towns, parishes, and the like, so far as the political government is concerned or affected; but not the relative positions of such local divisions, nor their precise boundaries further than they may be described in public statutes.”³⁶

§ 108a (107). Same—American rule.—It can well be imagined that in the United States, with its vast area, new rules, more suitable to a new country had to be framed, and effect given to them in the sense of a wider application of the recognition of the more numerous settlements and of their precise and relative locality.³⁷ Courts are bound to know judicially the boundaries of the United States, at least so far as they coincide with the boundaries of the state;³⁸ of the different states in the United States;³⁹ of the boundary of a territory, its division into judicial districts and the limits of each.⁴⁰ The court has judicial knowledge of the fact that Indian territory is beyond the boundary and jurisdiction of the state of Texas.⁴¹ Courts also take

³⁵ Jones v. United States, *supra*; Black v. Chicago etc. R. Co., 237 Ill. 500, 86 N. E. 1065 (title to public lands).

³⁶ Tayl. Ev., § 17. In Canada, Eastern Judicial District v. Winnipeg, 3 Man. L. R. 537; Ex parte McDonald, 27 S. C. R. 683.

³⁷ It is noticeable that in this country cities and towns are invariably named with the name of the state, sometimes abbreviated, as a suffix; while in England, the practice of naming the county after speaking of the town within it is the exception. What began here, perhaps, as a means of direction and identification for popular notice may have been a factor in the ultimate judicial recognition.

³⁸ Ogden v. Lund, 11 Tex. 688.

³⁹ King v. American Transp. Co., 1 Flap. 1, Fed. Cas. No. 7787; State v. Dunwell, 3 R. I. 127; Thorson v. Peterson, 9 Fed. 517, 10 Biss. 530; Goodwin v. Appleton, 22 Me. 453. See note to Gunning v. People, 82 Am. St. Rep. 439.

⁴⁰ United States v. Beebe, 2 Dak. 292, 11 N. W. 505; Boston v. State, 5 Tex. App. 383, 32 Am. Rep. 575; Goodwin v. Appleton, 22 Me. 453; State v. Cunningham, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; In re Commissioners of Elections, 64 Misc. Rep. 620, 120 N. Y. Supp. 580. See, also, State v. Carmody, 50 Or. 1, 12 L. R. A., N. S., 828, 91 Pac. 446, 1081; State v. Pennington, 124 Mo. 388, 27 S. W. 1106.

⁴¹ Conner v. State, 23 Tex. App. 378, 5 S. W. 189; Brevard Land etc. Co. v. Kinsland, 154 N. C. 79, 69

judicial notice of the boundaries of the political subdivisions of the state.⁴² Hence, they must take judicial notice of the boundaries and extent of the different counties in the state.⁴³ Courts take judicial notice of the boundaries of a judicial district and of the counties or territory included therein;⁴⁴ and of the United States judicial and congressional districts,⁴⁵ and internal revenue districts;⁴⁶ also of the boundaries of a city as described in the act of its incorporation;⁴⁷ and of the general location, boundaries and

S. E. 779 (boundary line run in pursuance of treaty power judicially noticed).

⁴² *State v. Snow*, 117 N. C. 774, 23 S. E. 322. The system of general surveys' is also judicially noticed: *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936.

⁴³ *Smitha v. Flournoy*, 47 Ala. 345; *Bowling v. Mobile & M. R. R. Co.*, 128 Ala. 550, 29 South. 584; *Bittle v. Stuart*, 34 Ark. 224; *Cox v. State*, 68 Ark. 462, 60 S. W. 27; *Crow v. Roane*, 86 Ark. 172, 110 S. W. 801; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *Merritt v. Trinity County*, 3 Cal. App. 168, 84 Pac. 675; *Evans v. Kilby*, 81 Ga. 278, 7 S. E. 226; *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161; *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439; *Cooper v. State*, 2 Ga. App. 730, 59 S. E. 20; *Ross v. Reddick*, 2 Ill. 73; *Cornshock v. People*, 56 Ill. App. 467; *Jasper Co. Commrs. v. Spittler*, 13 Ind. 235; *Indianapolis etc. R. R. Co. v. Moore*, 16 Ind. 43; *Denney v. State*, 144 Ind. 503, 31 L. R. A. 726, 42 N. E. 929; *Board of Commrs. v. State*, 147 Ind. 476, 46 N. E. 908; *Kansas City etc. R. R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589; *Atchison T. & S. F. Ry. Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082; *Zimmerman v. Brooks*, 25 Ky. L. Rep. 2284, 80 S. W. 443; *Ham v. Ham*, 39 Me. 263; *Com-*

monwealth v. Springfield, 7 Mass. 9; *Woods v. Henry*, 55 Mo. 560; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *Parker v. Burton*, 172 Mo. 85, 72 S. W. 663; *City Nat. Bank v. Goodloe-McClelland Com. Co.*, 93 Mo. App. 123; *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 294; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837; *Reed v. Territory*, 1 Okl. Cr. 481, 129 Am. St. Rep. 861, 98 Pac. 583; *Bond v. Perkins*, 4 Heisk. (Tenn.) 364; *State v. Jordan*, 12 Tex. 205; *Wright v. Hawkins*, 28 Tex. 452; *McGill v. State*, 25 Tex. App. 499, 8 S. W. 661; *Hughes v. Adams*, 55 Tex. Civ. 197, 119 S. W. 134.

⁴⁴ *Chicago etc. R. R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8; *Commonwealth v. Fitzpatrick*, 121 Pa. 109, 6 Am. St. Rep. 757, 1 L. R. A. 451, 15 Atl. 466.

⁴⁵ *United States v. Johnson*, 2 Saw. (U. S.) 482, Fed. Cas. No. 15,488.

⁴⁶ *United States v. Jackson*, 104 U. S. 41, 26 L. Ed. 651.

⁴⁷ *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494; *Coe College v. City of Cedar Rapids*, 120 Iowa, 541, 95 N. W. 267; *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589; *City of Topeka v. Cook*, 72 Kan. 595, 84 Pac. 376; *Martin v.*

juxtaposition of counties, towns and wards, mentioned in an act authorizing a census.⁴⁸

§ 108b (107). **Same—Counties and county seats.**—Judicial notice is taken of the division of states into counties, towns and cities.⁴⁹ Courts take notice not only of the division of the state into counties, but of the name and location of each of such counties.⁵⁰ This applies to counties created by the legislature only.⁵¹ Notice is taken of the time of the organization of the counties in the state and of

Martin, 51 Me. 366; Commonwealth v. Springfield, 7 Mass. 9; Burfenning v. Chicago, St. P., M. & O. R. Co., 46 Minn. 20, 48 N. W. 444; Kansas City v. Vineyard, 128 Mo. 75, 30 S. W. 236; Griffing v. Gibb, 2 Black (U. S.), 519, 17 L. Ed. 353. See, also, Grusenmeyer v. City of Logansport, 76 Ind. 549.

⁴⁸ State v. Cunningham, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724. In Canada: Hart v. Boston Marine Ins. Co., 26 N. S. R. 427; The Queen v. McDonald, 29 N. S. R. 160.

⁴⁹ Vanderwerker v. People, 5 Wend. (N. Y.) 530; La Grange v. Chapman, 11 Mich. 499; Lyell v. Lapeer County, 6 McLean (U. S.), 446, 8 Fed. Cas. No. 8618; Goodwin v. Appleton, 22 Me. 453; State v. Powers, 25 Conn. 48; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Dickenson v. Breeden, 30 Ill. 279; Mossman v. Forrest, 27 Ind. 233; People v. Breese, 7 Cow. 429; Chapman v. Wilber, 6 Hill (N. Y.), 475; State v. Mayor, 11 Humph. (Tenn.) 217.

⁵⁰ Overton v. State, 60 Ala. 73; Camp v. Marion Co., 91 Ala. 240, 8 South. 786; Trammell v. Chambers Co., 93 Ala. 388, 9 South. 815; Bittle v. Stuart, 34 Ark. 224; Lyman v. State, 90 Ark. 596, 119 S. W. 1116; Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. 710; People v. Ebanks,

117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049; State v. Powers, 25 Conn. 48; Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161; Huxford v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439; Moore v. State, 126 Ga. 414, 55 S. E. 327; Gooding v. Morgan, 70 Ill. 275; Higgins v. Bullock, 66 Ill. 37; Pitts v. Lewis, 81 Iowa, 51, 46 N. W. 739; Zimmerman v. Brooks, 25 Ky. Law Rep. 2284, 80 S. W. 443; Holley v. Holley, Litt. Sel. Cas. (16 Ky.) 505, 12 Am. Dec. 342; Harvey v. Wayne, 72 Me. 430; Commonwealth v. Desmond, 103 Mass. 445; State v. Pennington, 124 Mo. 388, 27 S. W. 1106; Ex parte Carr, 22 Neb. 535, 35 N. W. 409; State v. Snow, 117 N. C. 774, 23 S. E. 322; Adams v. State, 35 Tex. Cr. 285, 33 S. W. 354; Hall v. Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30; Huey v. Van Wie, 23 Wis. 613; Beasley v. Beckley, 28 W. Va. 81; Gager v. Henry, 5 Saw. 237, 9 Fed. Cas. No. 5172; Brunt v. Thompson, 2 Ad. & El., N. S., 789, 42 Eng. Com. L. 913; King v. Inhabitants of Chagford, 4 Barn. & Ald. 235, 6 Eng. Com. L. 413, 106 Eng. Reprint, 923; Reg. v. Whittles, 13 Ad. & El., N. S., 248, 66 Eng. Com. 247; Queen v. Inhabitants of St. Maurice, 16 Ad. & El., N. S., 908, 71 E. C. L. 906.

⁵¹ Buckinghouse v. Gregg, 19 Ind. 401.

their location;⁵² of the fact that premises described in a mortgage by section, range and township are in fact in a new county carved out of an old county;⁵³ and that a township named in the evidence is in the county named in the indictment;⁵⁴ and that a certain county is embraced in a certain judicial district;⁵⁵ and of the area of counties;⁵⁶ and of their geographical situation within the state.⁵⁷ Judicial notice is also taken of every county seat in the state, and of its location,⁵⁸ and of the location of the counties in relation to each other.⁵⁹ On the question of knowledge of its incorporation, there has not been uniformity, but the ruling in a late Kentucky case appears to us to be sound,

⁵² *Pitts v. Lewis*, 81 Iowa, 51, 46 N. W. 739; *Ellsworth v. Nelson*, 81 Iowa, 57, 46 N. W. 740; *People v. Wallace*, 101 Cal. 281, 35 Pac. 862.

⁵³ *Faekler v. Wright*, 86 Cal. 210, 24 Pac. 996.

⁵⁴ *Commonwealth v. Kaiser*, 184 Pa. 493, 39 Atl. 299.

⁵⁵ *Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818. But the court cannot take judicial notice that a particular part of a public road is situated in a certain county: *Waters v. State*, 117 Ala. 189, 23 South. 28.

⁵⁶ *Board of Commrs. v. State*, 147 Ind. 476, 46 S. E. 908.

⁵⁷ *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *Lewis v. Rasp*, 14 Okl. 69, 76 Pac. 142. See, also, the late cases: *Scott v. Dunkel Box etc. Co. (Ark.)*, 152 S. W. 1025 (natural boundary); *Seaboard Air Line Ry. v. Peeples (Ga. App.)*, 77 S. E. 12; *Annheuser-Busch Brewing Assn. v. Doss (Okl.)*, 129 Pac. 49 (location of towns, etc.).

⁵⁸ *St. Louis Iron Mt. & S. R. Co. v. State*, 68 Ark. 561, 60 S. W. 654; *People v. Faust*, 113 Cal. 172, 45 Pac. 261; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *Cole v. Segraves*, 88 Cal. 103, 25 Pac. 1109; *Crosson v. Sumner*, 125 Ga. 291, 54 S. E. 181; *Andrews v. Knox County*, 70 Ill. 65; *Mode v. Beasley*, 143 Ind. 309, 42 N.

E. 727; *Adair v. Eglad*, 58 Iowa, 314, 12 N. H. 277; *State v. Laffer*, 38 Iowa, 422; *Brownsville v. Arbuckle*, 30 Ky. Law Rep. 414, 99 S. W. 239; *Ladd v. Craig*, 94 Miss. 659, 47 South. 777; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *Phillips v. Lindley*, 112 App. Div. 283, 98 N. Y. Supp. 423; *St. Louis etc. R. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428; *Board v. State*, 19 Okl. 375, 91 Pac. 699 (*de facto* county seat); *Marx v. Croisan*, 17 Or. 393, 21 Pac. 310; *Missouri etc. R. Co. v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395; *Flynt v. Eagle Pass. Coal & Coke Co. (Tex. Civ. App.)*, 77 S. W. 831; *Hambel v. Davis*, 89 Tex. 256, 59 Am. St. Rep. 46, 34 S. W. 439; *Whitener v. Belknap*, 89 Tex. 273, 34 S. W. 594; *Gager v. Henry*, 5 Saw. 237, 9 Fed. Cas. No. 5172.

⁵⁹ *Hegard v. California Ins. Co. (Cal.)*, 11 Pac. 594; *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161; *Huxford v. Southern Pine Co., supra*; *Parker v. State*, 126 Ga. 443, 55 S. E. 329; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494; *Parker v. State*, 133 Ind. 178, 18 L. R. A. 567, 574, 32 N. E. 836, 33 N. E. 119; *Denney v. State*, 144 Ind. 503, 31 L. R. A. 728, 42 N. E. 929; *State v. DeBailion*, 37 La. Ann.

namely, that judicial notice should be taken of such incorporation and that a county has adopted township organization.⁶⁰

§ 108c (107). **Same—Cities and towns.**—It may be stated as a general rule that courts take judicial notice of the location of important cities or towns.⁶¹ The rule is well settled and universally adhered to that, in both civil and criminal cases, the courts take judicial notice that a certain city or town named is in a particular county, though the latter is not named.⁶² There are a few old cases in

392; *State v. Pennigton*, 124 Mo. 388, 27 S. W. 1106; *Lewis v. Rasp*, 14 Okl. 69, 76 Pac. 142; *Coover v. Davenport*, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706; *McGill v. State*, 25 Tex. App. 499, 8 S. W. 661; *Wright v. Hawkins*, 28 Tex. 452, 471; *King v. Inhabitants of Chagford*, 4 Barn. & Ald. 235, 6 Eng. Com. L. 413, 106 Eng. Reprint, 923.

⁶⁰ *People v. Robinson*, 17 Cal. 363; *Gilbert v. Moline Co.*, 19 Iowa, 319; *Sipe v. Holliday*, 62 Ind. 4; *Brownsville v. Arbuckle*, 30 Ky. Law Rep. 414, 99 S. W. 239.

⁶¹ *Green v. Lineville Drug Co.*, 150 Ala. 112, 124 Am. St. Rep. 17, 43 South. 216 (that city not on a railroad); *State v. City of Wildwood (N. J.)*, 84 Atl. 274 (extent and position of municipality); *King v. American Transp. Co.*, 1 Flip. 1, Fed. Cas. No. 7787; *Toppan v. Cleveland etc. R. R. Co.*, 1 Flip. 74, Fed. Cas. No. 14,099; *Dickinson v. Branch Bank*, 12 Ala. 54; *Parks v. Jacob Dold Packing Co.*, 6 Misc. Rep. 570, 27 N. Y. Supp. 289; *Whitlock v. Castro*, 22 Tex. 108.

⁶² *Smitha v. Flournoy*, 47 Ala. 345; *Forehand v. State*, 53 Ark. 46, 13 S. W. 728; *People v. Smith*, 1 Cal. 9; *Central R. R. etc. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494; and

of the county in which a town or city is situated: *State v. Tootle*, 2 Harr. (Del.) 541; *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123; *Sullivan v. People*, 122 Ill. 385, 13 N. E. 248; *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415; *Green v. Paul*, 60 Neb. 7, 82 N. W. 98; *Luck v. State*, 96 Ind. 16; *Indianapolis Ry. Co. v. Stephens*, 28 Ind. 429; *Baily v. Birkhofer*, 123 Iowa, 59, 98 N. W. 594; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *State v. Simpson*, 91 Me. 83, 39 Atl. 287; *Martin v. Martin*, 51 Me. 366; *Goodwin v. Appleton*, 22 Me. 453; *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *Baumann v. Granite Sav. Bank*, 66 Minn. 227, 68 N. W. 1074; *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Morgan v. State*, 64 Miss. 511, 1 South. 749; *Myher v. Myher*, 224 Mo. 631, 123 S. W. 806; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *People v. Wood*, 131 N. Y. 617, 30 N. E. 243; *St. Louis etc. R. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428; *Marx v. Croisan*, 17 Or. 393, 21 Pac. 310; *Pearce v. Langfit*, 101 Pa. 512, 47 Am. Rep. 737; *Solyer v. Romanet*, 52 Tex. 562; *Monford v. State*, 35 Tex. Cr. 237, 33 S. W. 551; *Carson v. Dalton*, 59 Tex. 500; *Coover v. Davenport*, 1 Heisk. (Tenn.) 368, 2

which it has been maintained that the courts will not take judicial notice of such locations, but they are of no weight except as curiosities. For example, that the courts will not judicially recognize New Orleans as being in the state of Louisiana;⁶³ nor that Philadelphia, the place where a note was dated, was not in the state of Texas.⁶⁴ Judicial notice will also be taken of the geographical situation of towns and cities in counties within the state.⁶⁵ Courts take judicial notice of the streets of a city, their location, and relation to one another, and the direction in which they run as laid down on an official map of such city;⁶⁶ and of the streets and of the names and location of suburbs, from time to time brought within the city limits;⁶⁷ also of the relation of the streets of a city to one another, and their location, and that a crossing where an improvement is located necessarily forms a part of the public street,⁶⁸ pro-

Am. Rep. 706; *Saukville v. State*, 69 Wis. 178, 33 N. W. 88; *Hinckley v. Beckwith*, 23 Wis. 328; *Beasley v. Beckley*, 28 W. Va. 81; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590; *Rice v. Montgomery*, 4 Biss. (U. S.) 75, Fed. Cas. No. 11,753. The English cases do not go the length of noticing the county locations of cities: *Humphreys v. Budd*, 9 D. P. C. 1000, 5 Jur. 630; *Brune v. Thompson*, 2 Q. B. 789, 2 G. & D. 110, Car. & M. 34.

⁶³ *Riggin v. Collier*, 6 Mo. 568; *Andrews v. Hoxie*, 5 Tex. 171.

⁶⁴ *Cook v. Crawford*, 4 Tex. 420. For other instances where courts have refused to take notice of towns in other states, see *Woodward v. Railroad Co.*, 21 Wis. 309, and that a certain town was not in a given county, *Chapman v. Wilber*, 6 Hill (N. Y.), 475.

⁶⁵ *State v. Powers*, 25 Conn. 48; *State v. Tootle*, 2 Harr. (Del.) 541; *Martin v. Martin*, 51 Me. 366; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *State v. Wa-*

bash Paper Co., 21 Ind. App. 176, 48 N. E. 653, 51 N. E. 949; *Solyer v. Romanet*, 52 Tex. 562; *Kansas City Ry. Co. v. Burge*, 40 Kan. 736, 19 Pac. 791; *Clayton v. May*, 67 Ga. 769; *Schilling v. Territory*, 2 Wash. Ter. 283, 5 Pac. 926; *Wright v. Hawkins*, 28 Tex. 452; *Commonwealth v. Desmond*, 103 Mass. 445; *Steinmetz v. Versailles etc. Co.*, 57 Ind. 457; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *Luck v. State*, 96 Ind. 16.

⁶⁶ *Brady v. Page*, 59 Cal. 52; *Williams v. Savings etc. Soc.*, 97 Cal. 122, 31 Pac. 908; *Whiting v. Quackenbush*, 54 Cal. 306; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Mayhew v. Eugene*, 56 Or. 102, 104 Pac. 727 (location of state university); *Walsh v. Missouri Pac. Ry. Co.*, 102 Mo. 589, 14 S. W. 873, 15 S. W. 757; *Poland v. Dreyfous*, 48 La. Ann. 83, 18 South. 906; *State v. Ruth*, 14 Mo. App. 226.

⁶⁷ *Poland v. Dreyfous*, 48 La. Ann. 83, 18 South. 906.

⁶⁸ *Williams v. Savings etc. Soc.*, 97 Cal. 122, 31 Pac. 908.

vided such streets are established by statute.⁶⁹ Courts take judicial notice of the subdivision of town and city property into separate lots and blocks, for the purpose of determining what land is covered by a homestead exemption;⁷⁰ but not of the relative situation of lots and blocks on a map or plat not introduced in evidence, or as to how they apply to the ground.⁷¹ Courts judicially know that a certain township of land has no legal subdivisions known as "blocks";⁷² and that the term is applied only to the subdivisions of a platted town, village or city.⁷³

§ 109 (108, 109). Officers of the national government.—

In addition to the judicial recognition of form of government and territory, the rule was declared, in an English case,⁷⁴ that the courts will recognize all public matters which affect the government of the country. On this principle the accession and death of the sovereign and principal officers of state are recognized; and in the United States, in many cases, the courts have recognized the rule, and have so extended its application as to include many sub-

⁶⁹ *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283. It has been held, however, that courts cannot take judicial notice of the streets of a city, nor of their direction: *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 68. Such notice cannot be taken of the place of the intersection of a street with a railroad track: *Pennsylvania Co. v. Frana*, 13 Ill. App. 91. And it has also been held that courts cannot judicially know the distance between various streets of a city: *North Chicago Street Ry. Co. v. Cheetham*, 58 Ill. App. 318. Judicial notice will be taken that premises described by a street are within the particular judicial district within which it is situated: *People v. Kelly*, 20 Hun (N. Y.), 549. Courts take judicial notice of the location and situation of streets, squares, and public grounds in a city: *Prince v. Crocker*, 166 Mass. 347-364, 32 L. R. A.

610, 44 N. E. 446. Judicial notice cannot be taken of the location of an office of a justice of the peace in a city, nor that a particular number on a given street is in a given ward of such city: *Allen v. Scharinghausen*, 8 Mo. App. 229.

⁷⁰ *Hill v. Bacon*, 43 Ill. 477; *Gardner v. Eberhart*, 82 Ill. 316; *Sever v. Lyons*, 170 Ill. 395, 48 N. E. 926.

⁷¹ *Shepard v. Shepard*, 36 Mich. 173.

⁷² *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849.

⁷³ *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849.

⁷⁴ *Taylor v. Barclay*, 2 Sim. 21, 57 Eng. Reprint, 769; *Henry v. Cole*, 7 Mod. 103, 87 Eng. Reprint, 1124, 2 Ld. Raym. 811, 92 Eng. Reprint, 42; *Rex v. Jones*, 2 Camp. 131; *Lord Melville's Case*, 29 How. St. Tr. 707.

ordinate officers. Thus they recognize the chief magistrate of the state and nation⁷⁵ and the principal officers of the federal government, the time of their accession to office, their terms of service, their public duties and in some cases their public acts.⁷⁶ Courts will take judicial notice of the appointment and tenure of office of a member of the President's Cabinet.⁷⁷ Clearly, the rule would include United States senators, judges of the supreme and other federal courts, foreign ministers, United States marshals; and it has been held to include the heads of bureaus. Thus in a case where a patent was signed by an acting commissioner of patents, the court held it proper to take notice judicially of the persons who from time to time preside over the patent office, whether permanently or transiently;⁷⁸ and as to who was deputy controller of the currency at a given time.⁷⁹

⁷⁵ *Liddon v. Hodnett*, 22 Fla. 442; *Hizer v. State*, 12 Ind. 330; *Powers v. Commonwealth*, 22 Ky. Law Rep. 1807, 61 S. W. 735, 23 Ky. Law Rep. 146, 53 L. R. A. 245, 63 S. W. 976; *Lindsey v. Attorney General*, 33 Miss. 508, 528; *State v. Boyd*, 34 Neb. 435, 51 N. W. 964; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575; *Deweese v. Colorado Co.*, 32 Tex. 570; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

⁷⁶ *Wetherbee v. Dunn*, 32 Cal. 106; *Backus Steam Heater Co. v. Simonds*, 2 App. D. C. 290; *Liddon v. Hodnett*, 22 Fla. 442; *State v. Bowles*, 70 Kan. 821, 69 L. R. A., N. S., 176, 79 Pac. 726; *Herriott v. Broussard*, 4 Mart. N. S., (La.), 260; *Walden v. Canfield*, 2 Rob. (La.) 466; *Frederick v. Goodbee*, 120 La. 783, 45 South. 606; *People v. Johr*, 22 Mich. 461; *State v. Yeomen*, 111 Minn. 39, 126 N. W. 404; *Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579; *State v. Board of State Canvassers*, 32 Mont. 13, 4 Ann. Cas. 73, 79 Pac. 402; *Major v. State*, 2 Sneed (Tenn.), 11; *Calloway v. Sanford* (Tenn. Ch.), 35 S. W. 776; *State v. Schnitzler*, 16 Wyo. 479, 95

Pac. 698; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 Sup. Ct. Rep. 290; *The York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 30, 41, 15 L. Ed. 27; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Perovich v. Perry*, 167 Fed. 789, 93 C. C. A. 209; *In re Orpen*, 86 Fed. 760; *In re Smith*, 10 L. J. (Can.) 247, 1 Greenl. Ev., § 6.

⁷⁷ *Frederick v. Goodbee*, 120 La. 783, 45 South. 606.

⁷⁸ *York Railway Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Backus Steam Heater Co. v. Simonds*, 2 App. D. C. 290. As to the recognition of inferior federal officials by the state government, see *Kellogg v. Finn*, 22 S. D. 578, 133 Am. St. Rep. 945, 18 Ann. Cas. 363, 119 N. W. 545.

⁷⁹ *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 Sup. Ct. Rep. 290. In *State v. Bowles*, 70 Kan. 821, 69 L. R. A., N. S., 176, 79 Pac. 726, the question of the identity of the attorney general was raised, and in such cases obviously the judicial recognition cannot be extended till the identification is established, if it has been challenged: See *San Joaquin v. Budd*, 96 Cal. 47, 30 Pac. 967 (the

The cases cited are illustrations of the inclusion of such officers as the commissioners of the general land office, the receiver of public moneys for the United States, and the United States consuls in foreign countries.

§ 109a (108, 109). **Officers of the state governments.**—The judicial recognition by the state courts of the principal officers of state, executive, legislative and judicial, is on the same lines as those of the federal courts.⁸⁰ There is some conflict as to how far courts should go in the exercise of judicial knowledge in respect to who are occupants of inferior offices and tribunals. It is settled that they will take notice of who are the principal officers of state, heads of departments, foreign ministers, United States senators, marshals, sheriffs, and the like, and the genuineness of their signatures. We think that the courts ought at least to go so far as to take notice as to who fill the various county offices within their jurisdiction and the genuineness of their signatures.⁸¹ Thus courts of last resort will judicially notice judges of subordinate courts.⁸² But there is no uni-

court can have no judicial knowledge that a person who is sued upon a promissory note, or made a defendant in an action to recover possession of real estate, and who may have the same name as a judge of the superior court, is in fact such judge); *Alexander v. Burnham*, 18 Wis. 210; *Reach v. Quinn*, 159 Ala. 340, 48 South. 540 (identity of justice of the peace). The mere identity of name appearing from the signature of the attesting officer and that of the person who signed the accusation as prosecuting attorney will not warrant the assumption, as matter of law, that the same individual acted not only as a notary public, but also in the capacity of solicitor of the city court: *Shuler v. State*, 125 Ga. 778, 54 S. E. 689.

⁸⁰ *Dewees v. Colorado Co.*, 32 Tex. 570; *State v. Williams*, 5 Wis. 313, 68 Am. Dec. 65; *Lindsey v. Attorney*

General, 33 Miss. 508; *People v. Johr*, 22 Mich. 461; *Gilliland v. Administrators of Sellers*, 2 Ohio St. 223. See notes to *Slaughter v. Barnes* (3 A. K. Marsh. (Ky.) 412), 13 Am. Dec. 192; and to *Olive v. State* (86 Ala. 88, 5 South. 653), 4 L. R. A. 33, on the general subject of this section.

⁸¹ *Wetherbee v. Dunn*, 32 Cal. 103.

⁸² *Kilpatrick v. Commonwealth*, 31 Pa. 198; *Clark v. Commonwealth*, 29 Pa. 129; *Russell v. Sargeant*, 7 Ill. App. 98; *Ex parte Peterson*, 33 Ala. 74 (but the supreme court of Ohio declined thus to recognize the duration of its own sessions: *Gilliland v. Administrators of Sellers*, 2 Ohio St. 223); and in North Carolina even the particular place where they are at a particular time in the discharge of their duties: *State v. Ray*, 97 N. C. 510, 1 S. E. 876; but will not judicially notice officers or attorneys

formity of decision as to officers outside the particular jurisdiction exercised. It can hardly be called a conflict, in that it is a rule of the presiding court, and in those jurisdictions where it is held, that outside appointments will not be judicially noticed, and the parties must come prepared to prove them.⁸³ Judicial notice has been taken of sheriffs;⁸⁴ but not their deputies;⁸⁵ judicial notice is taken of other county officers,⁸⁶ such as registers and recorders,⁸⁷ tax collectors,⁸⁸ clerks of court,⁸⁹ county clerks,⁹⁰ justices

of inferior courts: *Clark v. Morrison*, 5 Ariz. 349, 52 Pac. 985; nor of the change of residence of an attorney: *Sutton v. Railway Co.*, 98 Wis. 157, 73 N. W. 993.

⁸³ The following cases are those in which different appointments have been noticed: *White v. Rankin*, 90 Ala. 541, 8 South. 118; *Colgin v. State Bank*, 11 Ala. 222; *Crawford v. Branch Bank at Mobile*, 7 Ala. 205; *Roberts v. State Bank*, 9 Port. (Ala.) 312; *Himmelman v. Hoadley*, 44 Cal. 213, 226; *Fisk v. Hopping*, 169 Ill. 105, 48 N. E. 323; *Brckett v. People*, 115 Ill. 29, 3 N. E. 723; *Marsee v. Middlesborough Town Lands Co.*, 23 Ky. Law Rep. 1258, 65 S. W. 118; *Templeton v. Morgan*, 16 La. Ann. 438; *Dwight v. Splane*, 11 Rob. (La.) 487; *Mayes v. Palmer*, 206 Mo. 293, 103 S. W. 1140; *Campbell v. Dewick*, 20 N. J. Eq. 186; *In re Clement*, 132 App. Div. 598, 117 N. Y. Supp. 30; *Farley v. McConnell*, 7 Lans. (N. Y.) 428; *Fox v. Commonwealth*, 81 Pa. 511; *Goddard v. Gloninger*, 5 Watts (Pa.), 209, 219; *State v. Cooper* (Tenn. Ch.), 53 S. W. 391; *Major v. State*, 2 Sneed (Tenn.), 11; *Bennett v. State*, Mart. & Yerg. (Tenn.) 133; *Fancher v. De Montegre*, 1 Head (Tenn.), 40; *Alexander v. Burnham*, 18 Wis. 210; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590.

⁸⁴ *Alexander v. Burnham*, 18 Wis.

199; *Martin v. Aultman Co.*, 80 Wis. 150, 49 N. W. 749; *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98; *Ragland v. Wynn's Admr.*, 37 Ala. 32; *State v. Megaarden*, 85 Minn. 41, 89 Am. St. Rep. 534, 88 N. W. 412; *Ingram v. State*, 27 Ala. 17. See, also, note to *Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.) 412, 13 Am. Dec. 192.

⁸⁵ *Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.) 412, 13 Am. Dec. 192; *Himmelman v. Hoadley*, 44 Cal. 214; *State Bank v. Curran*, 10 Ark. 142; *Land v. Patteson*, Minor (Ala.), 14; *Ward v. Henry*, 19 Wis. 76, 88 Am. Dec. 672.

⁸⁶ *Kilpatrick v. Commonwealth*, 31 Pa. 198; *Russell v. Sargeant*, 7 Ill. App. 98; *Himmelman v. Hoadley*, 44 Cal. 214; *Joyce v. Joyce*, 5 Cal. 449; *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Collins v. State*, 58 Ind. 5.

⁸⁷ *Fancher v. DeMontegre*, 1 Head (Tenn.), 40; *Scott v. Jackson*, 12 La. Ann. 640.

⁸⁸ *Burnett v. Henderson*, 21 Tex. 588; *Wetherbee v. Dunn*, 32 Cal. 106; *Templeton v. Morgan*, 16 La. Ann. 438.

⁸⁹ *White v. Rankin*, 90 Ala. 541, 8 South. 118.

⁹⁰ *Stinson v. Russell*, 2 Overt. (Tenn.) 40; *Burton v. Pettibone*, 5 Yerg. (Tenn.) 443; *Major v. State*, 2 Sneed (Tenn.), 11; *State v. Cole*, 9 Humph. (Tenn.) 626; and see note, 13 Am. Dec. 192.

of the peace,⁹¹ and especially officers of the county in which the court sits.⁹² They will not, however, take judicial notice of the locality of the office of a justice of the peace.⁹³ It goes without saying that the courts take judicial notice of what is prescribed by public law, as to the official character,⁹⁴ qualifications,⁹⁵ duties, powers, jurisdiction,⁹⁶ compensation,⁹⁷ existence,⁹⁸ times of election,⁹⁹ expiration of terms of office¹⁰⁰ and terms of office of public officers.¹

⁹¹ *Ede v. Johnson*, 15 Cal. 53; *Fox v. Commonwealth*, 81 Pa. 511; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89.

⁹² *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Thielmann v. Burg*, 73 Ill. 293; *Wetherbee v. Dunn*, 32 Cal. 106; *McCarty v. Johnson*, 20 Tex. App. 184, 49 S. W. 1098; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *White v. Rankin*, 90 Ala. 368, 8 South. 118; *Martin v. Aultman & Co.*, 80 Wis. 150, 49 N. W. 749; *Harris v. Buehler*, 1 Penne. (Del.) 346, 40 Atl. 733; *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879; *Goodman v. Harrison*, 28 Tex. Civ. App. 7, 66 S. W. 308.

⁹³ *Allen v. Scharringhausen*, 8 Mo. App. 222. See, also, note to *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 663, treating of judicial notice generally.

⁹⁴ *Fox v. Commonwealth*, 81 Pa. 511.

⁹⁵ *Harris v. Burns*, 14 Mo. App. 229.

⁹⁶ *Masterson v. Matthews*, 60 Ala. 260; *Cary v. State*, 76 Ala. 78; *Greene v. Boaz*, 157 Ala. 68, 47 South. 255; *County of Sacramento v. Central Pac. Ry. Co.*, 61 Cal. 250; *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305; *Ex parte Bargagliotti*, 6 Cal. App. 333, 92 Pac. 96; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688; *Lynn v.*

People, 170 Ill. 527, 48 N. E. 964; *Inglis v. State*, 61 Ind. 212; *State v. Gates*, 67 Mo. 139; *Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; *People v. Palmer*, 6 App. Div. 19, 39 N. Y. Supp. 631; *Bishop v. Lucy*, 21 Tex. Civ. App. 326, 50 S. W. 1029; *People v. Lyman*, 2 Utah, 30.

⁹⁷ *State v. Sanders*, 62 Mo. App. 33; *State v. Pohlman*, 60 Mo. App. 444.

⁹⁸ *State v. Dahl*, 65 Wis. 510, 27 N. W. 343, existence of school districts and duties of officers.

⁹⁹ *State v. Minnick*, 15 Iowa, 123; *United States v. Morrissey*, 32 Fed. 147.

¹⁰⁰ *Stubbs v. State*, 53 Miss. 437.

¹ *Ragland v. Wynn*, 37 Ala. 32; *White v. Rankin*, 90 Ala. 541, 8 South. 118; *Cary v. State*, 76 Ala. 78; *Vahle v. Bräckenseik*, 145 Ill. 231, 34 N. E. 524; *Collins v. State*, 58 Ind. 5; *Hizer v. State*, 12 Ind. 330; *Lindsey v. Attorney General*, 33 Miss. 508, 528; *Stubbs v. State*, 53 Miss. 437; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *Aultman-Taylor Machinery Co. v. Burchett*, 15 Okl. 490, 83 Pac. 719; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; *State v. Schnitger*, 16 Wyo. 479, 95 Pac. 698 (general organization of the state).

§ 110 (110). **Subordinate officers in other states.**—There is no doubt that state courts are not called upon, even by courtesy, to judicially notice the officers of other states. Although the seals of officers in foreign countries and sister states are recognized when there is proper compliance with the statutes for authenticating documents, the courts do not in other cases generally recognize the acts of subordinate officers of other states or countries.² Thus the courts in Wisconsin refused to notice judicially that there are county judges in New York authorized to administer oaths. There should in such cases be some evidence of the facts either by the seal of office, as that of a notary public, which is recognized everywhere,³ or by a certificate of a public officer attested by seal.⁴

§ 110a (110). **Notaries public.**—In the interests of commerce the rules of evidence have been so extended that the acts of *notaries public* in the discharge of their duties under the law-merchant are judicially noticed in all courts; and their proper official acts under the law-merchant are *prima facie* sufficiently authenticated by their seals.⁵ The

² *Morse v. Hewett*, 28 Mich. 481; *People v. Marion*, 29 Mich. 40; *Munroe v. Eastman*, 31 Mich. 286; *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159; *United States v. Bank of United States*, 11 Rob. (La.) 418; *Rogers v. McCoach*, 66 Misc. Rep. 85, 120 N. Y. Supp. 686. As to judicial notice of seals, see § 107, *ante*.

³ See § 110a, *post*.

⁴ *Fellows v. Menasha*, 11 Wis. 558. But courts know judicially that tribunals exist in other states for the administration of justice: *Dozier v. Joyce*, 8 Port. (Ala.) 303.

⁵ *Pardee v. Schanzlin*, 3 Cal. App. 597, 86 Pac. 812; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 753; *Denmead v. Maaek*, 2 McArth. (D. C.) 475; *Mc-*

Donald v. People, 123 Ill. App. 346; *Teutonia Loan etc. Co. v. Turrell*, 19 Ind. App. 469, 65 Am. St. Rep. 419, 49 N. E. 852; *Rindskoff v. Malone*, 9 Iowa, 540, 74 Am. Dec. 367, and long note; *Stoddard v. Sloan*, 65 Iowa, 680, 22 N. W. 924; *Stephens v. Williams*, 46 Iowa, 540; *Grand Rapids v. Hastings*, 36 Mich. 123; *Brown Mfg. Co. v. Gilpin*, 120 Mo. App. 130, 96 S. W. 669; *Dale v. Wright*, 57 Mo. 110; *Beach v. Workman*, 20 N. H. 379; *Carter v. Burley*, 9 N. H. 558; *Delafield v. Hand*, 3 Johns. (N. Y.) 314; *Delafield v. Hand*, 3 Johns. (N. Y.) 310; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463; *McKeller v. Peck*, 39 Tex. 381; *Second National Bank v. Chancellor*,

omission of a notary to affix his seal of office to his certificate of his acts, at common law, did not affect the validity of the certificate made by the officer. At common law, notaries were authorized to provide themselves with seals and authenticate their official acts with them, and when so authenticated their certificates of such acts were received in evidence by the courts of all civilized countries without further proof, and were *prima facie* evidence that the recitals contained therein were true; but if not authenticated, proof had to be made of the notary's official character before it could be received in evidence.⁶ In the United States, nearly all of the states regulate the powers, duties, and responsibilities of notaries, and also the certification of the official acts. In some, however, the common-law rules prevail. In other states, it is provided by law that acts of notaries may be performed without an official seal.⁷ In the discharge of duties, other than under the law-merchant, the acts of notaries will not be judicially noticed except on principles common to other officers or pursuant to statutes. Judicial notice has been taken of a notary's term of office;⁸ and within the counties in which they are sitting the courts invariably take judicial cognizance of notaries past and present,⁹ and of their seals and signatures.¹⁰ In a case in

9 W. Va. 69; *Pierce v. Indseth*, 106 U. S. 546, 27 L. Ed. 254, 1 Sup. Ct. Rep. 418; *Townsley v. Sumrall*, 2 Pet. (U. S.) 170, 7 L. Ed. 386; *In re Keeler*, Hempst. 306, 14 Fed. Cas. No. 7637; *Orr v. Lacy*, 4 McLean, 243, 18 Fed. Cas. No. 10,589; *The Gallego*, 30 Fed. 271; *Hutcheon v. Mannington*, 6 Ves. Jr. 823, 31 Eng. Reprint, 1327; *Brooke v. Brooke*, L. R. 17 Ch. Div. 833; *Cole v. Sherard*, 11 Ex. 482.

⁶ *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463.

⁷ *Rindskoff v. Malone*, 9 Iowa, 540, 74 Am. Dec. 367, and note thereto on the omission of the notary to affix his seal.

⁸ *Cary v. State*, 76 Ala. 78.

⁹ *Russell v. Huntsville etc. Co.*, 137 Ala. 627, 34 South. 855; *Coleman v. State*, 63 Ala. 93; *Cox v. Stern*, 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906; *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879; *Schaefer v. Kienzel*, 123 Ill. 430, 15 N. E. 164; *Eichenbaum v. Levee*, 78 Ill. App. 610; *Rowley v. Berrian*, 12 Ill. 198; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa, 32, 96 N. W. 984; *Stoddard v. Sloan*, 65 Iowa, 680, 22 N. W. 924; *Rowland v. Brown*, 75 Iowa, 679, 37 N. E. 403; *Wiley v. Carson*, 15 S. D. 298, 89 N. W. 475.

¹⁰ *Thielman v. Bing*, 73 Ill. 293; *Cox v. Stern*, 170 Ill. 442, 62 Am.

Iowa, where a notary had signed a *jurat* in that state simply as notary without designating his county and had affixed his seal, the court required no proof that he was a notary for that county.¹¹

§ 111 (111). **Official signatures and seals.**—It is not to be expected that in this country the English practice in respect to the recognition of official signatures and seals should be followed. In England there are many statutes providing that the courts shall take judicial notice of the signatures of public officials; but in the absence of statutes the signatures must be proved. In his work on Evidence, Taylor suggests the view that the courts would not recognize the signatures of the lords of the treasury, and doubts whether the royal sign manual would be thus noticed.¹² A more liberal rule has prevailed in the United States; and courts will recognize the seals and signatures of the chief magistrate, of the heads of departments and principal officers of the government, state and national,¹³ and of the officers of the court.¹⁴ When a court takes judicial notice of an officer, it would seem to be necessarily implied that it also recognizes his official signature.¹⁵ In

St. Rep. 385, 48 N. E. 906; Denmead v. Maack, 2 McArth. (D. C.) 475; Stoddard v. Sloan, 65 Iowa, 680, 22 N. W. 924.

¹¹ Stoddard v. Sloan, 65 Iowa, 680, 22 N. W. 924.

¹² Tayl. Ev., § 14; Rex v. Miller, 2 W. Black. 797, 96 Eng. Reprint, 468; Rex v. Guilly, 1 Leach C. C. 98. As to judicial notice of seals, see § 107, *ante*.

¹³ Wells v. Jackson Iron etc. Co., 47 N. H. 235, 90 Am. Dec. 575; People v. Johr, 22 Mich. 461; Ex parte Peterson, 33 Ala. 74; 1 Greenl. Ev., § 5.

¹⁴ Bishop v. State, 30 Ala. 34; Yell v. Lane, 41 Ark. 53; Sacramento v. Central Pac. Ry. Co., 61 Cal. 250; Dyer v. Last, 51 Ill. 179; Hammann v. Mink, 99 Ind. 279; State v. Postle-

wait, 14 Iowa, 446; Mackinnon v. Barnes, 66 Barb. 91; State v. Cole, 9 Humph. (Tenn.) 626; Major v. State, 2 Sneed (Tenn.), 11; People v. Lyman, 2 Utah, 30; Norvell v. MeHenry, 1 Mich. 227.

¹⁵ Ryan v. Young, 147 Ala. 660, 41 South. 954; Cary v. State, 76 Ala. 78; Sandlin v. Anderson, 76 Ala. 403; Himmelman v. Hoadley, 44 Cal. 214, 226; Walcott v. Gibbs, 97 Ill. 118; People v. Paulsen, 146 Ill. App. 534; Hayes v. Berwick, 2 Mart., O. S., (La.), 138, 5 Am. Dec. 727; Scott v. Jackson, 12 La. Ann. 640; Herriott v. Broussard, 4 Mart., N. S. (La.), 260; Despau v. Swindler, 3 Mart., N. S. (La.), 705; Graham v. Gibson, 14 La. 146; Templeton v. Morgan, 16 La. Ann. 438; State v.

some states this is provided for by statute.¹⁶ Indeed, it is held that this recognition extends to the handwriting of the officer, and that his signature will be accepted without proof even where there is no addition of the official title.¹⁷ So, where only the initial letters of the official title are added,¹⁸ and where a clerk's certificate contained his name and official designation, and had the seal of the court affixed, but was not signed.¹⁹ As we have seen in the last section, the seals and signatures of other of the subordinate officers within the state are thus often judicially noticed.²⁰ Among the seals not judicially noticed are those of corporations,²¹ of officers of foreign governments,²² and foreign municipal courts.²³ The seals of the consuls of our own government are, of course, noticed here just as those of other governments are in their respective countries.²⁴ But the seal of

Hopkins, 118 La. 99, 42 South. 660; State v. Yoemen, 111 Minn. 39, 126 N. W. 404; Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Browne v. Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463; Goddard v. Gloninger, 5 Watts, 209, 219; Martin v. Aultman, 80 Wis. 150, 49 N. W. 749; Smyth v. New Orleans Canal & Bkg. Co., 93 Fed. 899, 35 C. C. A. 646; Alcock v. Whatmore, 8 Dowl. Pr. 815.

¹⁶ Russell's Stats. 1909, p. 29; Ky. Stats., § 1625. All courts, tribunals and officers shall take notice of the official signature of any officer of this state, of the United States, or of any state or territory in the United States. See, also, Powers v. Commonwealth, 110 Ky. 386, 53 L. R. A. 245, 61 S. W. 735, 63 S. W. 976; Barret v. Godshaw, 12 Bush (Ky.), 592; Marsee v. Middlesborough Town Lands Co., 23 Ky. Law Rep. 1258, 65 S. W. 118.

¹⁷ Alcock v. Whatmore, 8 Dowl. Pr. 615; Donohoo v. Brammon, 1 Overt. (Tenn.) 328.

¹⁸ Stinson v. Russell, 2 Overt. (Tenn.) 40; State v. Manley, 1

Overt. (Tenn.) 428; Nelson v. Cummins, 1 Overt. (Tenn.) 436; Craig v. Vance, 1 Overt. (Tenn.) 209; Fancher v. De Montegre, 1 Head (Tenn.), 40.

¹⁹ Burton v. Pettibone, 5 Yerg. 443.

²⁰ Other instances are those of justices of the peace: Ede v. Johnson, 15 Cal. 53; Fox v. Commonwealth, 81 Pa. 511; district attorneys: People v. Lyman, 2 Utah, 30; clerks of court: Bishop v. State, 30 Ala. 34; Major v. State, 2 Sneed (Tenn.), 11; collectors: Wetherbee v. Dunn, 32 Cal. 106. See cases collected, in 7 Ency. of Ev., 981. And see on this general subject the note to Slaughter v. Barnes (3 A. K. Marsh. (Ky.) 412), 13 Am. Dec. 192.

²¹ Vaughn v. Hankinson, 35 N. J. L. 79 (diploma under seal of New Jersey Medical Society).

²² Schoerken v. Swift, Courtney, Beecher Co., 7 Fed. 469; Beach v. Workman, 20 N. H. 379.

²³ Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168.

²⁴ Barber v. International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

the consul is only noticed when affixed to consular documents in the legal sense of the term. Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificates of any other fact.²⁵ The one exception to the rule of not judicially noticing the seals of corporations is that of the city of London.²⁶

§ 112 (112, 113). **Law of the forum—The constitution of the United States—Acts of Congress.**—It is almost a platitude to say that judicial notice must be taken of laws, and the only reason for the special notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice; and it has therefore become the task of the legal chronicler to mark them. The law of the jurisdiction is peculiarly a matter of judicial cognizance. It is only on the presumption that the law is known to the court that there can be any proceedings whatever in courts of justice. It is therefore elementary that the constitution of the United States and its amendments, and the public statutes of the United States,²⁷ will be judicially

²⁵ Church v. Hubbard, 2 Cranch (U. S.), 187, 2 L. Ed. 249.

²⁶ From 7 Ency. of Ev., p. 983, we learn that that exception "appears to have been based on the antiquity of the city, its recognition by the Magna Charta and the importance and dignity of its judicial and municipal institutions." The article from which this information was gleaned was written by Edward W. Tuttle for the Encyclopedia, and its matter is as useful as its method of treatment is painstaking and accurate.

²⁷ It is well to define here what the law of the forum is. According to Bouvier's Law Dictionary, page 835, the forum is the tribunal which has authority to decide respecting something in dispute, located within its jurisdiction; therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitae* is held to be of universal obligation, as to all matters of right and title on which it professes to decide in relation to such property. And the same

noticed in all courts.²⁸ The acts of Congress prove themselves both in the federal and state courts and need not be offered in evidence.

§ 112a (112, 113). Same—International law—Treaties. Having thus shown that provision has been made for the recognition of the laws of the United States—one nation among many—it is equally elementary that the courts will take judicial notice of those laws which regulate the relations of the dominant powers of the earth—the law of nations. While foreign municipal laws must be proved as facts, those rules which by the common consent of mankind have been acquiesced in as law stand upon an entirely different footing. The courts are presumed to know those rules of conduct which have been generally adopted by the nations of the world in their commercial or other inter-

principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment: Story, Conf. Laws, §§ 532, 545, 551, 591, 592; Kaimes, Eq., b. 3, c. 8, § 4; 1 Greenl. Ev., § 541. *Forum rei* is used alternatively for the forum of the defendant's domicile (in which case it is the genitive of *reus*), or the forum of the thing in controversy (in which case it is said to refer to *res*, of which, however, it is not the genitive). See the late cases: Dana v. Hurst, 86 Kan. 947, 122 Pac. 1041; State v. Indian etc. Oil Co., 32 Okl. 607, 123 Pac. 166; Rowlands v. Chicago etc. R. Co., 149 Wis. 51, 135 N. W. 156; Northern Pac. R. Co. v. Wadekamper (Wash.), 126 Pac. 909; Scott v. Jacobs (Okl.), 126 Pac. 780.

²⁸ Jordan v. McConnell, 151 Ala. 279, 44 South. 101; Semple v. Hagar, 27 Cal. 163; Morris v. Davidson, 49 Ga. 361; Gooding v. Morgan, 70 Ill. 275; Perry v. Morris, 7 Ind. Ter. 146,

104 S. W. 571; Worden v. Cole, 74 Kan. 226, 86 Pac. 464; Dickey v. Pocomo City Bank, 89 Md. 280, 43 Atl. 33; Wood v. Nortman, 85 Mo. 298; Papin v. Ryan, 32 Mo. 21; Estate of Davis v. Watkins, 56 Neb. 288, 76 N. W. 575; Wheelock v. Lee, 15 Abb. Pr. (N. Y.), N. S., 24; Milliken v. Dotson, 117 App. Div. 527, 102 N. Y. Supp. 564; El Paso & S. W. Ry. Co. v. Smith, 50 Tex. Civ. App. 10, 108 S. W. 988; United States v. Jackson, 104 U. S. 41, 26 L. Ed. 651; Gardner v. The Collector, 6 Wall. (U. S.) 499, 18 L. Ed. 890; Pennsylvania R. Co. v. Baltimore & N. Y. R. Co., 37 Fed. 129; In re Price, 83 Fed. 830; United States v. Price, 84 Fed. 636; Marrash v. United States, 168 Fed. 225, 93 C. C. A. 511. See notes to State v. Twitty (2 Hawk. (N. C.) 441), 11 Am. Dec. 780; Olive v. State (86 Ala. 88, 5 South. 653, 4 L. R. A. 33). As to proof of statutes and foreign laws, see § 501 et seq., *post*.

course; hence no proof thereof is required.²⁹ International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is, and that law—international law—is recognized by the courts.³⁰ Sometimes those laws are modified by treaties between two or more of the nations, and then, of course, their rights are adjustable by the measure of their high contract. By the constitution of the United States “all *treaties* made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”³¹ This article of the constitution has been frequently called into operation. Thus by the Ashburton Treaty, murder is a crime in the British dominions for the perpetration of which a fugitive is liable to be claimed.³² By treaty a portion of the

²⁹ The *Scotia*, 14 Wall. (U. S.) 170, 20 L. Ed. 822 (laws of navigation as to carrying lights). As to foreign laws, see *Barrielle v. Bettman*, 199 Fed. 838.

³⁰ The *Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320, 20 Sup. Ct. Rep. 290; *Hilton v. Guyot*, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139; *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549.

³¹ Art. 6, U. S. Const.; *Hauenstein*

v. Lynham, 100 U. S. 483, 25 L. Ed. 628; *Ware v. Hylton*, 3 Dall. (U. S.) 199, 1 L. Ed. 568; *United States v. De Coursey*, 1 Pinn. (Wis.) 508; *Strother v. Cathey*, 5 N. C. 162, 3 Am. Dec. 683. See, also, *Schweitzer v. Hamburg etc. Gesellschaft*, 149 App. Div. 900, 134 N. Y. Supp. 812.

³² *Montgomery v. Deeley*, 3 Wis. 709; *Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Dole*

territory of New York was ceded to the state of Massachusetts, and afterward, under authority of both states and of the nation, the title of the Indians thereto was extinguished.³³ So the courts have taken judicial knowledge of the treaties of the United States with Indian tribes, and that, under such treaties, the title to the lands in the Indian Reservations in Oklahoma Territory is in the Indian tribes, or in the United States for the benefit of the Indians, and that there is no real estate therein, subject to taxation.³⁴ By the treaty of Paris between the United States and Spain, the Philippine Islands became a part of the territory of the United States.³⁵ And it was judicially noticed that by the same treaty the island of Porto Rico became territory of the United States, although not an organized territory in the technical sense of the word.³⁶ The cession of the territory of Alaska by the treaty of March 30, 1867,

v. Wilson, 16 Minn. 525; Howard v. Moot, 64 N. Y. 262; United States v. Reynes, 9 How. (U. S.) 127, 13 L. Ed. 74; Lacroix Fils v. Sarrazin, 15 Fed. 489, 4 Woods, 174.

³³ People v. Snyder, 41 N. Y. 397; Howard v. Moot, 64 N. Y. 271.

³⁴ Gay v. Thomas, 5 Okl. 1, 46 Pac. 578.

³⁵ La Rue v. Insurance Co., 68 Kan. 539, 75 Pac. 494.

³⁶ De Lima v. Bidwell, 182 U. S. 1, 45 L. Ed. 1041, 21 Sup. Ct. Rep. 743. As was said by Chief Justice Marshall in United States v. The Peggy, 1 Cranch (U. S.), 103, 110, 2 L. Ed. 49, 51: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress." And in Foster v. Neilson, 2 Pet. (U. S.) 253, 314, 7 L. Ed. 415, 435, he repeated this in substance: "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of

justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." So in Whitney v. Robertson, 124 U. S. 190, 31 L. Ed. 386, 8 Sup. Ct. Rep. 456: "By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." To the same effect are the Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. Ed. 227, sub nom. 207 Half Pound Papers Smoking Tobacco v. United States, 20 L. Ed. 227, and the Head Money Cases, 112

between Russia and the United States has been judicially noticed, as also the protocol of transfer of October 18, 1867, and the inventories of property, the map of New Archangel, or Sitka, attached to the protocol, all of which were executed by the high contracting powers to the treaty to effect such transfer.³⁷ And if a treaty has been made subsequent to a decree in due form of condemnation of a vessel, the court will decree restoration of the property, judicially taking note of the terms of the treaty.³⁸

§ 112b (112, 113). Same—Constitution and statutes of the state.—The recognition of the international and federal laws and treaties is thus demonstrated to be complete, and on the same general principle all courts, whether state or federal, are bound to take notice of the constitution, of the public statutes and of the law as declared in decided cases, of the state in which such courts are held;³⁹ and this in-

U. S. 580, sub nom. *Edye v. Robertson*, 112 U. S. 580, 28 L. Ed. 798, 5 Sup. Ct. Rep. 247.

³⁷ *Callsen v. Hope*, 75 Fed. 758.

³⁸ *United States v. Schooner Peggy*, 1 Cranch (U. S.), 103, 2 L. Ed. 49.

³⁹ *Jemison v. Planters & Merchants' Bank of Mobile*, 17 Ala. 754; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Cox v. Board*, 161 Ala. 639, 49 South. 814; *Campbell v. County*, 147 Ala. 703, 41 South. 407; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Kansas City S. R. Co. v. S.*, 90 Ark. 343, 119 S. W. 288; *Williams v. State*, 37 Ark. 463; *Fowler v. Pierce*, 2 Cal. 165; *Ex parte Kearny*, 55 Cal. 212, 221; *Railway Co. v. Offield*, 78 Conn. 1, 60 Atl. 740; *Williamantic School Soc. v. First School Soc.*, 14 Conn. 457; *State v. Briscoe*, 6 Penne. (Del.) 401, 67 Atl. 154; *Lane v. Harris*, 16 Ga. 217; *People v. Hill*, 163 Ill. 186, 36 L. R. A. 634, 46 N. E. 796; *Vance v.*

Rankin, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807; *Pittsburg, Ft. W. & C. R. Co. v. Moore*, 110 Ill. App. 304; *Green v. City of Indianapolis*, 22 Ind. 192; *State v. Wheeler*, 172 Ind. 578, 19 Ann. Cas. 834, 89 N. E. 1; *Hard v. City of Decorah*, 43 Iowa, 313; *Anderson v. Commonwealth (Ky.)*, 117 S. W. 364; *L'Eglise v. Brenton*, 3 La. 435; *Doss v. Board*, 117 La. 450, 41 South. 720; *Trustees of the Ministerial & School Fund v. Kendrick*, 12 Me. 381; *State v. Jarrett*, 17 Md. 309; *Slymer v. State*, 62 Md. 237; *Attorney General v. McCabe*, 172 Mass. 417, 52 N. E. 717; *Moynihan v. Holyoke*, 193 Mass. 26, 78 N. E. 742; *Hurlbut v. Britain & Wheeler*, 2 Doug. (Mich.) 191; *People v. Commissioner of State Land Office*, 23 Mich. 270; *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118; *Peterson v. Village of Cokato*, 84 Minn. 205, 87 N. W. 615; *Buckingham v. Walker*, 48 Miss. 609; *Lohmeyer v. St. Louis Cordage Co.*,

cludes the laws of the country from which such state was formed in effect prior to such detachment.⁴⁰ There is no

214 Mo. 685, 113 S. W. 1108; *State v. Munch*, 57 Mo. App. 207; *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62; *Wikel v. Board of Commissioners*, 120 N. C. 451, 27 S. E. 117; *State v. Cooper*, 101 N. C. 684, 8 S. E. 134; *Opinion of the Justices*, 35 N. H. 579; *Rader v. Township of Union*, 43 N. J. L. 518; *Bronson v. Wiman*, 10 Barb. 406, 426; *Shaw v. Tobias*, 3 N. Y. 188; *In re Mohawk R. Bridge*, 128 App. Div. 54, 112 N. Y. Supp. 423; *People v. Herkimer*, 4 Cow. (N. Y.) 345, 15 Am. Dec. 379; *Pittsburg C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543; *State v. Banfield*, 43 Or. 287, 72 Pac. 1093; *Mayhew v. Eugene*, 56 Or. 102, 104 Pac. 727; *Nelson v. Narragansett El. Co.*, 26 R. I. 258, 106 Am. St. Rep. 711, 67 L. R. A. 116, 58 Atl. 802; *Robinson v. Morris*, 30 R. I. 485, 73 Atl. 611; *State v. Sartor*, 2 Strob. (S. C.) 60; *East Tennessee Iron Mfg. Co. v. Gaskell*, 70 Tenn. 742; *Cash v. State*, 10 Humph. (Tenn.) 111; *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277; *Burnett v. Henderson*, 21 Tex. 589; *Maverick v. Flores*, 71 Tex. 110, 8 S. W. 636; *International & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545, 81 S. W. 82; *People v. Hopt*, 3 Utah, 396, 4 Pac. 250; *Downer v. Woodbury*, 19 Vt. 329; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146; *Legrand v. President & Trustees of Hampden Sydney College*, 5 Munf. (Va.) 324; *Squilache v. Tidewater etc. Coke Co.*, 64 W. Va. 337, 62 S. E. 446; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336; *Davey v. City of Janesville*, 111 Wis. 628, 87 N. W. 813; *State v. Foote*, 11 Wis. 14, 78 Am. Dec. 689; *United States v. De Coursey*, 1 Pinn. (Wis.) 508; *Horn v. Chicago*

& N. W. R. Co., 38 Wis. 463; *Field v. Clark*, 143 U. S. 649, 675, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495; *Reid v. United States*, 211 U. S. 529, 53 L. Ed. 313, 29 Sup. Ct. Rep. 171; *Marbury v. Madison*, 1 Cranch (U. S.), 137, 2 L. Ed. 60; *Furman v. Nichol*, 8 Wall. (U. S.) 44, 19 L. Ed. 370; *Lathrop v. Stuart*, 5 McLean, 167, 14 Fed. Cas. No. 8113; *In re Muller, Deady*, 513, 17 Fed. Cas. No. 9912; *Young v. Montgomery & E. R. Co.*, 2 Woods, 606, 30 Fed. Cas. No. 18,166; *Harpending v. Dutch Church*, 16 Pet. (U. S.) 455, 10 L. Ed. 1029; *Barry v. Snowden*, 106 Fed. 571; *Western & A. Ry. Co. v. Roberson*, 61 Fed. 592, 9 C. C. A. 646; *Merchants' Bank v. McGraw*, 59 Fed. 972, 8 C. C. A. 420; *Loree v. Abner*, 57 Fed. 159, 6 C. C. A. 302; *People v. Herkimer*, 4 Cow. (N. Y.) 345, 15 Am. Dec. 379; *The Prince's Case*, 8 Coke, 28, 77 Eng. Reprint, 514; *King v. Sutton*, 3 M. & S. 532, 542, 105 Eng. Reprint, 931; *Consumers C. Co. v. Connelly*, 31 Can. Sup. 244; *Darling v. Hitchcock*, 25 U. C. R. 463; *Girdlestone v. O'Reilly*, 21 U. C. Q. B. 409; *Logan v. Lee*, 27 C. L. T. 781, 39 S. C. R. 311. See, also, the late cases: *Duy v. Alabama West. R. Co. (Ala.)*, 57 South. 724; *Walker v. Board (N. J.)*, 82 Atl. 422; *McCarton v. City of New York*, 149 App. Div. 516, 133 N. Y. Supp. 939; *Corvallis etc. R. Co. v. Benson*, 61 Or. 359, 121 Pac. 418; *McCammant v. Webb (Tex. Civ. App.)*, 147 S. W. 693; *Ritterbusch v. Atchison etc. R. Co.*, 198 Fed. 46.

⁴⁰ *United States v. Chaves*, 159 U. S. 452, 40 L. Ed. 215, 16 Sup. Ct. Rep. 57. In that case Mr. Justice Shiras said: "A question is raised in the brief for the government whether

rule of evidence better established than this; and differences of opinion have arisen, not in respect to the rule itself, but in determining what are public statutes within its meaning.⁴¹ Of course public statutes need not be *offered in evidence*. Although they are constantly referred to by counsel in argument and often read to the court, this is only a proper method of aiding the court in the investigation he would have the right to make. Said Baron Parke to counsel: "For the future, it would save time if, when you founded an objection upon an Act of Parliament, you had the Act here; for, though we are supposed to keep the statutes in our heads, we do not."⁴² The time when a public statute of the state takes effect and becomes a law, and whether it exists as law at any particular time, is a matter of judicial notice with the courts of the state.⁴³

the courts of the United States can take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession. It was said in *Fremont v. United States*, 58 U. S. (17 How.) 557, 15 L. Ed. 345, referring to a similar question under the treaties with Spain, ceding territories to the United States: 'It is proper to remark that the laws of these territories under which titles were claimed were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages.' The same position was asserted in the case of *United States v. Perot*, 98 U. S. 428, 25 L. Ed. 251.

⁴¹ The rule has been applied to acts conferring claims to lands: *Papin v. Ryan*, 32 Mo. 21; *Semple v. Hogan*, 27 Cal. 163; *Dickenson v. Breeden*, 30 Ill. 279; *Buchanan v. Whitham*,

36 Ind. 257. For the adjudication of private land claims: *Semple v. Hagar*, 27 Cal. 163. The bankrupt law and its operation: *Morris v. Davidson*, 49 Ga. 361; *Mims v. Swartz*, 37 Tex. 13. Internal revenue laws: *Kessel v. Albetis*, 56 Barb. (N. Y.) 362; and acts in relation to the District of Columbia: *Bayly's Admr. v. Chubb*, 16 Gratt. (Va.) 284; and to the federal and state constitutions: *Graves v. Keaton*, 3 Cold. (Tenn.) 8; *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

⁴² *Frost's Trial*, *Gurney's Rep.* 168.

⁴³ *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *People v. Hopt*, 3 Utah, 396, 4 Pac. 250; *State v. Foote*, 11 Wis. 14, 78 Am. Dec. 689; *Hoyt v. Russell*, 117 U. S. 401, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881; and the courts will take judicial notice of the existence of the evil which the legislature endeavored to correct by statute: *Hilborn v. Nye*, 15 Cal. App. 298, 114 Pac. 801.

And the existence or time of taking effect of a public statute cannot be put in issue or admitted or denied by the pleadings, but must be determined by the judges themselves. Accordingly, an allegation in answer to *quo warranto* that a statute under which the defendant claims to hold office was published and went into effect prior to the day of his alleged election is not admitted by a demurrer to such answer.⁴⁴ The court, having knowledge of public statutes, may even disregard the allegation in a pleading in respect thereto.⁴⁵

§ 113 (114). What are public statutes—Trend of judicial legislation.—We open this section with the pronounced opinion that all statutes should be regarded as public in the sense of judicial knowledge being required of them. The distinction between public and private statutes has no longer the need for existence, and the historical foundation on which the distinction rests might well be removed without the slightest inconvenience to the people, or any call for the smallest addition to the knowledge which judges are in the eye of the law supposed judicially to possess. It will be remembered we have pointed out that the court is, and should be, always requested to take judicial notice of the matter relied on by the party in a cause—for it would be absurd to suppose that any judge could carry all the provisions and enactments of the law in his memory and deal with them without suggestion or reference. Nevertheless the distinction technically exists, but we do not propose to deal with its origin. That can be found by the student in the cases.⁴⁶ The distinction has been entirely

⁴⁴ State v. Foote, 11 Wis. 14, 78 Am. Dec. 689.

⁴⁵ State v. Jarrett, 17 Md. 309. See note to Lanfear v. Mestier (18 La. Ann. 497), 89 Am. Dec. 663; Matter of Viemeister (179 N. Y. 235, 1 Ann. Cas. 334, 70 L. R. A. 796, 72 N. E. 97), 103 Am. St. Rep. 872, and to Louisville etc. R. Co. v.

Scott (133 Ky. 724, 118 S. W. 990), 19 Ann. Cas. 395.

⁴⁶ See Webster v. Reid, Morris (Iowa), (467) 615; Halbert v. Skyles, 1 A. K. Marsh. (Ky.) 368; Brown v. State, 11 Ohio, 277; Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132.

abolished in some of the states,⁴⁷ as indeed it should be in all, for the subject matter of any so-called private act is law, and, being law, the courts should judicially notice it.⁴⁸ The abolition of the distinction was well foreshadowed by the United States supreme court in 1889. Mr. Justice Miller, in dealing with the objection that a statute of Wisconsin could not make that a public law which in its essential nature was a private law, said:⁴⁹ "However this may be, we do not doubt the authority of the legislature of a state to enact that after the passage and publication of one of its statutes the courts of the state shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the states, must be binding in proceedings in federal courts in the same state. Indeed, the distinction between public and private acts has become very artificial and shadowy since legislative bodies have adopted the principle of publishing in printed form all

⁴⁷ See cases last cited, and *Hall v. Brown*, 58 N. H. 93.

⁴⁸ In *Hall v. Brown*, *supra*, the court made these pertinent remarks: "No evidence of any fact of which the court takes judicial notice need be given to the jury by the party alleging its existence; but the judge, upon being called upon to take notice thereof, may, if he be unacquainted with such fact, refer to a printed statute, historical work, or other proper source of information, or may refuse to take judicial notice thereof, unless and until the party calling upon him to take such notice produces satisfactory proof": *Steph. Dig. of Ev.*, May's Am. ed., art. 59, and note 1. "Courts," says Prof. Greenleaf, "will generally take notice of whatever ought to be generally known within their jurisdiction": 1 *Greenl. Ev.*, §§ 4-6. A distinction, formerly prevailing in England, between public and private acts, in this respect,

no longer exists: *Steph. Dig. of Ev.* 58. If a railroad charter in this state (all railroad corporations being declared public: *Gen. Stats.*, c. 146, § 1) can properly be denominated a private act, the annual distribution required by law (*Gen. Stats.*, c. 4, § 7) to each of the judges and to each clerk of the supreme court, "for the use of the court" of all laws, private as well as public, with equal evidence of authenticity and authority, seems to signify the legislative intention that the courts may take equal notice of both. Moreover, the charter, whether it be a public or a private act, is law; and proof of the law is for the court, and not for the jury, and may be received after verdict, without disturbing the verdict: *Whittier v. Varney*, 10 N. H. 291, 304.

⁴⁹ *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513, 10 Sup. Ct. Rep. 216.

statutes which they pass. Some of the states keep up the distinction by making a difference in the manner in which public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence; but the power of the legislature to declare in any case that after the passage and publication of any of its laws they shall be judicially noticed as public acts cannot, we think, be doubted."

§ 113a (114). **Same—Distinction between public and private statutes.**—We shall now proceed to examine this artificial and shadowy distinction. It is clear that statutes are public within the meaning of the rule just stated, although local in their character, where they contain an express provision that they are public.⁵⁰ The same rule applies when the law of the state requires all statutes to be judicially noticed.⁵¹ There is some difficulty in laying down a general rule by which the question may in all cases be determined, from the nature of the subject matter of the act. Provisions in statutes may lie very close to the border line between those which are public and those which are private in their nature. Again, the same statute may contain provisions limited in their effect to a few persons or to a class and other provisions which may affect a greater number. Public statutes are frequently spoken of in this connection as synonymous with general statutes and they were originally described as those which "relate to the kingdom at large."⁵² They have been held not to include those mere private acts which affect only a few individuals and which are in the nature of a contract between the state and the beneficiaries.⁵³ Acts have been declared

⁵⁰ *Clark v. Janesville*, 10 Wis. (142) 182; *Bowie v. Kansas*, 51 Mo. 454; *Hammond v. Inloes*, 4 Md. 138; *Beaty v. Knowler's Lessee*, 4 Pet. (U. S.) 164, 7 L. Ed. 813. See note to 11 Am. Dec. 787, and *Case v. Kelly*, *supra*.

⁵¹ *Junction Ry. Co. v. Bank of*

Ashland, 12 Wall. (U. S.) 226, 20 L. Ed. 385.

⁵² *Clark v. Janesville*, 10 Wis. 178; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721.

⁵³ *Leland v. Wilkinson*, 6 Pet. (U. S.) 317, 8 L. Ed. 412, is often cited as an authority on this distinction,

public if they "*extend to all persons within the territorial limits described in the statute.*"⁵⁴ Sedgwick defines them as "those that relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraints."⁵⁵ This definition is broad enough to include those acts which are designed to affect primarily some locality or class and yet which contain provisions that may affect the entire community or state.⁵⁶ The federal su-

but a reference to it will show that it was scarcely a case of private act as contradistinguished from a public one. Chief Justice Marshall did say: "The public laws of a state may without question be read in this court; and the exercise of any authority which they contain may be deduced historically from them; but private laws and special proceedings of the character spoken of are governed by a different rule. They are matters of fact, to be proved as such in the ordinary manner," but he also said that the evidence objected to "is understood to be offered to prove that certain proceedings have been had at different times in the legislature of Rhode Island, on private petitions of a similar nature with that before the court; and that there have been certain usages and proceedings in the legislature of Rhode Island in regard to the administration and sale of the estates of deceased persons for their debts, which will establish that it has for a long period by usage, and rightfully, exercised the authority contended for by the defendant." *First National Bank of Clarion v. Gruber*, 87 Pa. 468, 30 Am. Rep. 378, is also cited, but the expression of the court's opinion in that case goes to show a reference to the charter of a bank established under the general law.

⁵⁴ *Davis v. State*, 141 Ala. 84, 109 Am. St. Rep. 19, 37 South. 454; *Bevens v. Baxter*, 23 Ark. 387; *West v. Blake*, 4 Blackf. (Ind.) 234; *Levy v. State*, 6 Ind. 284; *Garfield Township v. Dodsworth Book Co.*, 9 Kan. App. 752, 58 Pac. 565; *Commonwealth v. Bierman*, 13 Bush (Ky.), 345; *City of Covington v. Hoadley*, 83 Ky. 444; *Rawlings v. State*, 2 Md. 201; *Slymer v. State*, 62 Md. 237; *Higgins v. State*, 64 Md. 419, 1 Atl. 876; *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. McCurdy*, 5 Mass. 324; *Harris v. City of Quincy*, 171 Mass. 472, 50 N. E. 1042; *North Platte Waterworks Co. v. City of North Platte*, 50 Neb. 853, 70 N. W. 393; *Gross v. City of Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Bretz v. Mayor etc. New York*, 35 How. Pr. (N. Y.) 130; *Taylor v. Hoya*, 9 Tex. Civ. App. 312, 29 S. W. 540; *Ryan v. State*, 32 Tex. 280 (but see *Hailes v. State*, 9 Tex. App. 170); *Meshke v. Van Doren*, 16 Wis. 319; *Castello v. Landwehr*, 28 Wis. 522; *Winooski v. Gokey*, 49 Vt. 282; *Darling v. Hitchcock*, 25 U. P. C. B. 463.

⁵⁵ *Sedg. Stat. & Const. Law*, p. 30.

⁵⁶ *Bevens v. Baxter*, 23 Ark. 387; *Bretz v. Mayor*, 6 Rob. (N. Y.) 325; *Burnham v. Webster*, 5 Mass. 266. Thus courts have taken judicial notice

preme court quotes approvingly from an Indiana case as follows: "Statutes incorporating counties, fixing their boundaries, establishing courthouses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not for that reason special or private acts." The court then adds: "In this country the disposition has been on the whole to enlarge the limits of this class of public acts and to bring within it all enactments of a general character or which in any way affect the community at large,"⁵⁷ and Sedgwick refers⁵⁸ to this disposition to treat all acts of a general character or which in any way affect the community at large, although affecting only a particular locality, if they apply to all persons, as public acts.⁵⁹ It may be fairly inferred from the illustrations given below that the public or private character of

of statutes increasing the jurisdiction of a given county court: *Meshke v. Van Doren*, 16 Wis. 319; establishing or changing a county seat: *State ex rel. Cothren v. Lean*, 9 Wis. 279; regulating the sale of liquor in a given place: *Levy v. State*, 6 Ind. 281; fixing or changing the boundaries of a city or county: *Commonwealth v. Springfield*, 7 Mass. 12; *State v. Jackson*, 39 Me. 291; prohibiting fishing within given limits: *Burnham v. Webster*, 5 Mass. 266; regulating the lumber traffic within a stated district: *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; and making it felony to steal the note of a particular bank: *United States v. Porte*, 1 Cranch C. C. 369, Fed. Cas. No. 16,070; improvements in navigable waters: *Hammond v. Inloes*, 4 Md. 138; grant from the public domain: *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305; railway reservations: *Woods v. Durrett*, 28 Tex. 429; *Wright v. Hawkins*, 28 Tex. 452; *Duren v. Houston & T. C. R. Co.*, 86 Tex. 287, 24 S. W. 258;

legislative appropriations: *Pritchard v. Woodruff*, 36 Ark. 196; *People v. Stuart*, 97 Ill. 123; public buildings and institutions: *Douglas v. Branch Bank of Mobile*, 19 Ala. 659; *Hauns v. Central Ky. Lunatic Asylum*, 20 Ky. Law Rep. 246, 45 S. W. 890; *Burlington Mfg. Co. v. Board of Courthouse etc. Commrs.*, 67 Minn. 327, 69 N. W. 1091; *Topp v. Watson*, 12 Heisk. (Tenn.) 411.

⁵⁷ *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405; *West v. Blake*, 4 Blackf. (Ind.) 234. See, also, *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; *New Portland v. New Vineyard*, 16 Me. 69; *Gorham v. Springfield*, 21 Me. 58.

⁵⁸ Sedg. Stat. & Const. Law, p. 25.

⁵⁹ In the code states the distinction is still marked. The following is a type of the enactment in such states: "Public and private statutes defined: § 1898. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other stat-

an act is determined, not so much by the extent of territory as by the number of people it may affect.⁶⁰ It may also be taken that the distinction will continue to fade until only its historical specter is left for future generations to smile at, lost in wonder at its longevity. The law must eventually demand that a statute—any statute—passed by the legislature has only to be brought to the notice of a court to insure its judicial recognition.⁶¹

§ 114 (115). Bank and railway charters.—In discussing the question of judicial notice of bank and railway charters, the first consideration must always be whether the institutions owe their existence to a special act incorporating them, or a general law under which they and similar corporations may be legally created. For although, in our opinion, already expressed, there should be no difference in the regard in which the creative law is held, there can be no question at all but that the general law under which all corporations may be created cannot in any aspect be regarded as other than a public statute. So that the consideration is narrowed to those which are specially created by a particular statute. Although banks and railroad companies are corporations organized for private gain, their charters generally contain provisions which directly or indirectly affect the entire community; such charters are by the weight of authority public acts, of which the courts take judicial cognizance.⁶² However, in some of the cases

utes are public, in which are included statutes creating or affecting corporations": Cal. Code Civ. Proc. For other definitions of public acts, see 6 Words and Phrases, p. 5772.

⁶⁰ *State ex rel. Cothren v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136. See cases already cited.

⁶¹ See generally on this subject the extended notes to *Lanfear v. Mestier* (18 La. Ann. 497), 89 Am. Dec. 663, and to *Olive v. State* (86 Ala. 88, 5 South. 653), 4 L. R. A. 33.

⁶² *Crawford v. Planters' & Merchants' Bank of Mobile*, 6 Ala. 289; *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204; *State v. Watkins*, 6 Ark. 123; *McKiel v. Real Estate Bank*, 4 Ark. 592; *Davis v. Bank of Fulton*, 31 Ga. 69; *Jackson v. State*, 72 Ga. 28; *Terry v. Merchants & Planters' Bank*, 66 Ga. 177; *Fuller v. Rapid Transit Co.*, 16 Haw. 1; *Danville Company v. State*, 16 Ind. 456; *Bank of Commonwealth v. Spilman*, 3 Dana (Ky.), 150; *Chicago, St. L. & N. O. R. Co.*

holding this rule, the statute in question was by its terms declared to be public, in which case the courts must take judicial cognizance of the act and those corporations which come under its provisions.⁶³ The contrary rule has been maintained in other cases, and hence has arisen a slight conflict, hardly worthy of the name, as the weight of authority is clearly in favor of regarding these acts as public, and apart from authority altogether the courts are taking the broad common-sense view that where the rights of the public may be involved, they will not restrict their cognizance so as to give effect to the pleading which calls for proof of the act. And it narrows itself down, after all, almost to the mere matter of pleading and proving the statute in question.⁶⁴ For obvious reasons courts do not

v. Liebel, 27 Ky. Law Rep. 716, 86 S. W. 549; *Agnew v. Bank of Gettysburg*, 2 Har. & G. (Md.) 478; *Whittington v. Farmers' Bank*, 5 Har. & J. 401 (489); *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; *Jones v. Fales*, 4 Mass. 245; *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 11 N. W. 124; *Case of Rogers*, 2 Me. 303; *Hall v. Brown*, 58 N. H. 93; *Bank of Utica v. Smeedes*, 3 Cow. (N. Y.) 662; *Smith v. Strong*, 2 Hill (N. Y.), 241; *Mayor etc. of Jersey City v. Railway Co.*, 70 N. J. L. 360, 57 Atl. 445; *Cincinnati, W. & B. R. Co. v. Hoffhines*, 46 Ohio St. 643, 22 N. E. 871; *Brown v. State*, 11 Ohio, 277; *Bank of Newberry v. Railroad Co.*, 9 Rich. (S. C.) 495; *Owen v. State*, 5 Sneed (Tenn.), 493; *Williams v. Union Bank*, 2 Humph. (Tenn.) 339; *State v. Shelton*, 7 Humph. (Tenn.) 31; *Shaw v. State*, 3 Sneed (Tenn.), 86; *Wright v. Hawkins*, 28 Tex. 452, 471; *Hays v. Northwestern Bank*, 9 Gratt. (Va.) 127; *State v. Randall*, 2 Aik. (Vt.) 89; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336; *State v. Baltimore & O. R. Co.*, 15 W. Va.

362, 392, 36 Am. Rep. 803; *Northwestern Bank of Virginia v. Machir*, 18 W. Va. 271; *Farmers' Bank v. Willis*, 7 W. Va. 31; *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513, 10 Sup. Ct. Rep. 216; *Central Bank v. Tayloe*, 2 Cranch C. C. 427, 5 Fed. Cas. No. 2548.

⁶³ See cases last cited; and also *Durham v. Daniels*, 2 G. Greene (Iowa), 518; *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Eel River Draining Assn. v. Topp*, 16 Ind. 242; *Delawater v. Sand Creek Ditching Co.*, 26 Ind. 407; *Cicero Hygiene Drain Co. v. Craighead*, 28 Ind. 274; *State v. McAllister*, 24 Me. 139; *State v. Webbs River Imp. Co.*, 97 Me. 559, 55 Atl. 495; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Rep. 64; *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179.

⁶⁴ *First National Bank v. Gruber*, 87 Pa. 468, 30 Am. Rep. 378; *Mandere v. Bonsignore Savings Bank*, 28 La. Ann. 415; *Perry v. Railroad Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Atchison, T. & S. F. Ry. v. Blackshire*, 10 Kan. 477. In *Cincinnati, W. & B.*

take judicial notice of *private corporations* organized under general laws; nor of their seals,^{64a} and it may be remarked that, under the modern constitutional prohibitions against special legislation, the distinction between public and special or private acts is becoming of less importance, and will, as we have ventured to forecast, at no distant date entirely disappear.

§ 115 (116). **Municipal charters.**—There is practically a consensus of opinion that judicial notice should be taken of the acts incorporating municipalities, for the reason that acts incorporating cities, villages and other municipal corporations may be regarded as inherently public, or, if local in their general character, as containing certain provisions which may affect the general public. Whatever may be the grounds of the rule, the courts have generally taken judicial notice of such acts, whether declared to be public or not.⁶⁵ As we have indicated, there is a slight conflict

R. Co. v. Hoffhines, 46 Ohio St. 643, 22 N. E. 871, the court said: "There is apparent conflict of decision in this state as to what laws will be judicially noticed, and there is at least doubt whether the act of March 21, 1851, can be so noticed. The holding in *Brown v. State*, 11 Ohio, 277, is authority to the effect that such a law can be noticed, while the decision in *Pittsburg etc. Ry. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543, is to the contrary. We will not here attempt to reconcile these cases. But it may be said of the earlier act, that, although it is in the form of a special law, and classed among the local laws in the yearly volume, yet it is of a public rather than private nature, inasmuch as it contains grants of sovereignty, interesting as well the community whose rights are thereby contracted, as the corporators whose rights are thereby enlarged. And assuming, without holding, that

both acts referred to may be judicially noticed, there still remains the question whether the contents of the commissioners' report can be so treated."

^{64a} *Griffing Co. v. Winfield*, 53 Fla. 589, 43 South. 687.

⁶⁵ *Case v. Mobile*, 30 Ala. 538; *City of Bessemer v. Carroll*, 154 Ala. 506, 45 South. 419; *Badgett v. State*, 157 Ala. 20, 48 South. 54; *Smith v. Flournoy's Admr.*, 47 Ala. 345, 361; *Alabama Gold L. Ins. Co. v. Cobb*, 57 Ala. 547; *Mayor v. Wetumpka Wharf Co.*, 63 Ala. 611, 625; *De Baker v. Southern California R. Co.*, 106 Cal. 257, 272, 46 Am. St. Rep. 237, 39 Pac. 610; *Bituminous Lime Rock Pav. & Imp. Co. v. Fulton (Cal.)*, 33 Pac. 1117; *Stoner v. Los Angeles*, 8 Cal. App. 607, 97 Pac. 692; *People v. Potter*, 35 Cal. 110; *Downs v. Commissioners of Town of Smyrna*, 2 Penne. (Del.) 132, 45 Atl. 717; *West v. Blake*, 4 Blackf. (Ind.) 234; *Swails v. State*, 4 Ind. 516; *Hard v.*

upon the question, but it need hardly be considered in the face of the mass of decisions the other way.⁶⁶ Hence the corporate existence or powers of such bodies need not be alleged nor proved.⁶⁷ But the fact that a city or other

City of Decorah, 43 Iowa, 313; Coe College v. City of Cedar Rapids, 120 Iowa, 541, 95 N. W. 267; Stier v. City of Oskaloosa, 41 Iowa, 353; Pitts v. Lewis, 81 Iowa, 51, 46 N. W. 739; Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423; Commonwealth v. Newport L. & A. Turnpike Co., 30 Ky. Law Rep. 1235, 100 S. W. 871; Attorney General v. McCabe, 172 Mass. 417, 52 N. E. 717; Shartle v. City of Minneapolis, 17 Minn. 308; State v. Tosney, 26 Minn. 262, 3 N. W. 345; Hornberger v. State, 47 Neb. 40, 66 N. W. 23; Bode v. State, 80 Neb. 74, 113 N. W. 996; Winnipisegoe Lake Co. v. Young, 40 N. H. 420, 428; People v. Breese, 7 Cow. (N. Y.) 429; Board v. Buckley, 82 S. C. 352, 64 S. E. 163; State v. Murfreesboro, 11 Humph. (Tenn.) 217; Dwyer v. City of Brenham, 65 Tex. 526; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200; Austin v. Forbis, 99 Tex. 234, 89 S. W. 405; City of Houston v. Dooley, 40 Tex. Civ. App. 371, 89 S. W. 777; Briggs v. Whipple, 7 Vt. 15; Atherton v. Village of Essex Junction, 83 Vt. 218, Ann. Cas. 1912A, 339, 74 Atl. 1118; French v. Barre, 58 Vt. 567, 5 Atl. 568; Beasley v. Town of Beckley, 28 W. Va. 81; City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484; Smith v. City of Janesville, 52 Wis. 680, 9 N. W. 789; O'Connor v. The City of Fon du Lac, 101 Wis. 83, 76 N. W. 1116; Castello v. Landwehr, 23 Wis. 522; Alexander v. Milwaukee, 16 Wis. 247. See, also, the recent cases: State v. Joseph (Ala.), 57 South. 942; Owens v. Dudley, 162 Cal. 422, 122 Pac. 1087; Muntzing v.

Newsom, 22 Colo. App. 446, 125 Pac. 130; Denver City T. Co. v. Carson, 21 Colo. App. 604, 123 Pac. 680; Fenet v. McCuiston (Tex.), 147 S. W. 867; White Townsite Co. v. City of Moorhead (Minn.), 138 N. W. 939.

⁶⁶ Inhabitants of Town of Butler v. Robinson, 75 Mo. 192; Loper v. Mayor and Aldermen of St. Louis, 1 Mo. 681; Apitz v. Missouri Pac. R. Co., 17 Mo. App. 419; O'Brien v. Wabash, St. L. & P. R. Co., 21 Mo. App. 12; Wisdom v. Wabash, St. L. & P. R. Co., 19 Mo. App. 324; Bowie v. Kansas City, 51 Mo. 454; Tilford v. Mayor & Aldermen of Woodbury, 7 Humph. (Tenn.) 190; City of Paris v. Tucker, 101 Tex. 99, 104 S. W. 1046; but see City of Houston v. Dooley, *supra*.

⁶⁷ Bessemer v. Carroll, 154 Ala. 506, 45 South. 419; State v. Matthews, 153 Ala. 646, 45 South. 307; Frost v. Clements, 153 Ala. 654, 45 South. 203; Arndt v. Cullman, 132 Ala. 540, 90 Am. St. Rep. 922, 31 South. 478; City of Selma v. Perkins, 68 Ala. 145; City Council of Montgomery v. Hughes, 65 Ala. 201; Perryman v. City of Greenville, 51 Ala. 507; City of Miami v. Miami Realty etc. Co., 57 Fla. 366, 49 South. 55; People v. Wilson, 3 Ill. App. 368; Macey v. Titcombe, 19 Ind. 135; Baumann v. Granite Sav. Bank & Trust Co., 66 Minn. 227, 68 N. W. 1074; Stone v. Auerbach, 133 App. Div. 75, 117 N. Y. Supp. 734; Naylor v. McCulloch, 54 Or. 305, 103 Pac. 68; State v. Mayor & Aldermen of Murfreesboro, 11 Humph. (Tenn.) 217; East Tennessee, V. &

community has become incorporated by *performing the conditions* prescribed by a general law must be proved. It is not the duty of courts to take judicial notice of the execution of statutes; the various modes by which statutes are carried into effect by the executive government or others are mere facts and must be proved as such.⁶⁸ However, when special legislation is forbidden, and a statute permits a city charter to be amended by ordinance of the city adopting statutory provisions, the court will take notice of such amendment by ordinance.⁶⁹ If, however, it appears from the record that a municipality has exercised corporate powers under a general law, the court may take notice of its organization.⁷⁰

G. R. Co. v. Mayor etc. of Morristown (Tenn. Ch.), 35 S. W. 771; Blutt v. State, 56 Tex. Cr. 528, 121 S. W. 168; Village of Winooski v. Gokey, 49 Vt. 282; Satterfield v. Commonwealth, 105 Va. 867, 52 S. E. 979; Davey v. City of Janesville, 111 Wis. 628, 87 N. W. 813; Durch v. Chippewa Co., 60 Wis. 227, 19 N. W. 79; Alexander v. City of Milwaukee, 16 Wis. 247; Terry v. City of Milwaukee, 15 Wis. 490. It is not necessary to prove the power to improve streets, to sue and to be sued and to pass ordinances and by-laws: Smith v. Janesville, 52 Wis. 680, 9 N. W. 789; Case v. Mobile, 30 Ala. 538; Payne v. Treadwell, 16 Cal. 221; Macey v. Titcombe, 19 Ind. 135; State v. Sherman, 42 Mo. 210; Janesville v. Milwaukee Ry. Co., 7 Wis. 484; nor need the repeal of such acts be proved: Belmont v. Morrill, 69 Me. 314; nor of supplementary or amendatory acts: Newark Bank v. Assessors, 30 N. J. L. 13; Unity v. Burrage, 103 U. S. 447, 26 L. Ed. 405.

⁶⁸ Johnson v. Common Council of City of Indianapolis, 16 Ind. 227; Hard v. City of Decorah, 43 Iowa, 313; Coe College v. City of Cedar

Rapids, 120 Iowa, 541, 95 N. W. 267; State v. Pittman, 10 Kan. 593; State v. Ricksecker, 73 Kan. 495, 85 Pac. 547; Brownsville v. Arbuckle, 30 Ky. Law Rep. 414, 99 S. W. 239; Canal Co. v. Railway Co., 4 Gill & J. (Md.) 1; City of Hopkins v. Kansas City, St. J. & C. R. R. Co., 79 Mo. 98; State v. Cleveland, 80 Mo. 108; Agnew v. Pawnee City, 79 Neb. 603, 113 N. W. 236; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200; Patterson v. State, 12 Tex. App. 222; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200, and note.

⁶⁹ Davey v. Janesville, 111 Wis. 628, 87 N. W. 813.

⁷⁰ In Illinois, in an action for a penalty for the violation of a village ordinance, it appeared there was a special law under which the "town of Bradford" could be and no doubt was organized, but there was no law other than an act of 1872 under which it could be organized as a village. It could only be a village under the general incorporation act. Evidence was found in the record that it had assumed to act as a village incorporation in the passage of ordinances and the bringing of suits in its corporate name, and it ap-

§ 116 (117). **Ordinances and other acts of municipal bodies.**—It is almost supererogatory to set down that courts do not take judicial cognizance of ordinances and other acts of municipal bodies. It would be a ridiculous extension of the catalogue of those things which a court for good reasons has judicially to know, to fasten upon them, and to save municipal bodies the trouble of proving them, official cognizance of such acts. Nor does there exist any valid reason why the municipal bodies should thus evade formal proof of those things which are seldom found not easily susceptible of proof. It is sufficiently burdensome upon the court to be required to take cognizance of all acts creating municipal corporations and their powers. They have uniformly refused to take cognizance of the acts and ordinances of such bodies or of the time when such ordinances take effect, except upon due proof;⁷¹ such, for

peared the offense of which defendant was convicted was committed within the corporate limits of the "village of Bradford." The court said that this was evidence of the existence of the village of Bradford, and as it was known there was no such village under any special law of the state, the court assumed that it must be under the general law; and, as was said in *Brush v. Lemma*, 77 Ill. 496, without proof that all the requirements of the statute had been complied with, judicial notice would be taken of the change of its organization under the general laws: *Doyle v. Village of Bradford*, 90 Ill. 416.

⁷¹ *Furhman v. Huntsville*, 54 Ala. 263; *Badgett v. State*, 157 Ala. 20, 48 South. 54; *Laundry Co. v. Lomax*, 166 Ala. 612, 52 South. 347; *Strickland v. Little Rock*, 68 Ark. 483, 60 S. W. 26; *Gardner v. State*, 80 Ark. 264, 269, 97 S. W. 48; *Metteer v. Smith*, 156 Cal. 572, 105 Pac. 735; *May v. Craig*, 13 Cal. App. 368, 109 Pac. 842; *Garland v. Denver*, 11 Colo.

534, 19 Pac. 460; *Freeman v. State*, 19 Fla. 552; *Logan v. Childs*, 51 Fla. 233, 41 South. 197; *Hill v. Atlanta*, 125 Ga. 697, 5 Ann. Cas. 614, 54 S. E. 354; *Dorsey v. State*, 7 Ga. App. 366, 66 S. E. 1096; *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435; *Western etc. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *People v. Buchanan*, 1 Idaho, 681; *People v. Heidelberg Garden Co.*, 233 Ill. 290, 297, 84 N. E. 230; *Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976; *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Lasher v. Littell*, 104 Ill. App. 211 (affirmed in 202 Ill. 551, 67 N. E. 372); *Munson v. Fenno*, 87 Ill. App. 655; *Wolf v. Keokuk*, 48 Iowa, 129; *State v. Leiber*, 11 Iowa, 407; *Sullivan v. Darratt*, 83 Kan. 799, 109 Pac. 777; *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16; *McPherson v. Nichols*, 48 Kan. 430, 29 Pac. 679; *Lucker v. Commonwealth*, 4 Bush (Ky.), 440; *Horne v. Mehler*, 64 S. W. 918, 23 Ky. Law Rep. 1176; *Lucker v. Commonwealth*, 4 Bush (Ky.), 440;

example, as ordinances establishing streets,⁷² the acts of county boards,⁷³ regulations of a canal board,⁷⁴ and land acts of a county in adopting township organization.⁷⁵ In a Wisconsin case, a village charter provided that all courts must take judicial notice of the ordinances of the village. Although the decision was rendered on other grounds, Judge Dixon thus expressed his views of the act: "It is

Burke v. Tricalli, 124 La. 774, 50 South. 710; Chappuis v. Marmouget, 104 La. 1, 28 South. 920; Laviosa v. Chicago etc. R. Co., McGloin (La.), 299; Shanfelter v. Baltimore, 80 Md. 483, 27 L. R. A. 648, 31 Atl. 439; Central Sav. Bank v. Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350; Attorney General v. McCabe, 172 Mass. 417, 52 N. E. 717; Winona v. Burke, 23 Minn. 254; Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797; St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; St. Louis v. Ameln, 235 Mo. 669, 139 S. W. 429; Canton v. Madden, 120 Mo. App. 404, 96 S. W. 699; St. Louis v. Theatre Co., 202 Mo. 690, 100 S. W. 627; Porter v. Waring, 69 N. Y. 250; New York v. Trust Co., 104 App. Div. 223, 93 N. Y. Supp. 937; Milton v. Grigsby, 132 App. Div. 854, 117 N. Y. Supp. 455; Daly v. O'Brien, 60 Misc. Rep. 423, 112 N. Y. Supp. 304; Collender v. Reardon, 121 N. Y. Supp. 531; Cunningham v. Ponca City, 27 Okl. 858, 113 Pac. 919. See the late cases: Adler v. Martin (Ala.), 59 South. 597; Coors v. Brock, 22 Colo. App. 470, 125 Pac. 599; District of Columbia v. Petty, 37 App. D. C. 156; Rudeson v. Glover (La.), 59 South. 817; State v. New Orleans, 130 La. 195, 57 South. 798; City of New York v. Seely-Taylor Co., 149 App. Div. 98, 133 N. Y. Supp. 808; City of New York v. Corn, 75 Misc. Rep. 463, 133 N. Y.

Supp. 459; People v. Creelman, 150 App. Div. 746, 135 N. Y. Supp. 718; House v. Chicago etc. R. Co. (S. D.), 138 N. W. 809; Toledo v. Libbie, 19 Ohio C. C. 704, 8 Ohio Cir. Dec. 589; City v. Cohen, 13 Wkly. Notes Cas. (Ohio) 468; Lancaster v. Harsh, 1 Lan. L. Rev. 209; Charleston v. Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845; Tilford v. Woodbury, 7 Humph. (Tenn.) 190; International etc. R. Co. v. Hall, 35 Tex. Civ. App. 545, 81 S. W. 82; Karchmer v. State (Tex. Cr. App.), 134 S. W. 700; Wilson v. State, 16 Tex. App. 497; Austin v. Walton, 68 Tex. 507, 5 S. W. 70; State v. Soragan, 40 Vt. 450; Norfolk etc. Tract Co. v. Forrest, 109 Va. 658, 64 S. E. 1034; State v. Kock, 138 Wis. 27, 119 N. W. 839; Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536; Horn v. Chicago etc. R. Co., 38 Wis. 463; Petit v. May, 34 Wis. 666; Stutsman v. Cheyenne, 18 Wyo. 499, 113 Pac. 322; Chortaw R. Co. v. Hamilton, 182 Fed. 117. See, also, note to Hill v. Atlanta (125 Ga. 697, 54 S. E. 354), 5 Ann. Cas. 614. As to proof of the statutes of the state, see § 501, *post*.

⁷² Porter v. Waring, 69 N. Y. 251.

⁷³ Indianapolis Ry. Co. v. Caldwell, 9 Ind. 379.

⁷⁴ Palmer v. Aldridge, 16 Barb. (N. Y.) 131.

⁷⁵ State v. Cleveland, 80 Mo. 108; Johnson v. Common Council, 16 Ind. 227.

difficult to perceive how the legislature can thrust knowledge into the heads of the judges in this way or what good can come of the enactment unless parties interested bring the ordinances or copies of them into court and put them in evidence in the usual way.''⁷⁶ The rule as to ordinances is subject to the qualification that a *municipal court* may take judicial notice of the ordinances of the municipality;⁷⁷ and on appeal therefrom it has been held that the *appellate court* is governed by the same rule as the municipal court.⁷⁸ There is a conflict, however, on the point. We cannot see how the appellate court can be asked to take judicial notice of such ordinances in some cases and not in others, especially on the ground that the municipal court—an inferior court—so recognized them. A superior court does not do so, and yet the court of appeal has been asked to avow knowledge of what, of course, is not on the record and which cannot possibly be within the same range of their judicial observation as it was within that of the municipal judicial officer. This is the view which has commended itself to a great many authorities, and may be taken to be the better law. There is very little difficulty in proving such ordinances, and the appellate court is far better able to deal satisfactorily with the appeal case if

⁷⁶ *Pettit v. May*, 34 Wis. 674; *Cox v. City of St. Louis*, 11 Mo. 131.

⁷⁷ *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258; *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845; *Hill v. Atlanta*, 125 Ga. 697, 5 Ann. Cas. 614, 54 S. E. 354; *Houren v. R. Co.*, 236 Ill. 620, 127 Am. St. Rep. 309, 20 L. R. A., N. S., 1110, 86 N. E. 611; *Seranton v. Danenbaum*, 109 Iowa, 95, 80 N. W. 221; *Laporte City v. Goodfellow*, 47 Iowa, 572; *State v. Leiber*, 11 Iowa, 407; *West v. Columbus*, 20 Kan. 633; *State v. Judge Criminal Dist. Ct.*, 105 La. 758, 30 South. 105; *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *Steiner v. State*, 78 Neb. 147, 110 N. W. 723; *Byer v. Harris*, 77 N. J. L. 304, 72

Atl. 136; *Wright v. Trenton*, 51 N. J. L. 497, 17 Atl. 1103; *Keck v. Cincinnati*, 4 Ohio S. & C. Pl. Dec. 324, 3 Ohio C. C. 320; *Anderson v. O'Donnell*, 29 S. C. 355, 13 Am. St. Rep. 728, 1 L. R. A. 632, 7 S. E. 523; *In re Oliver*, 21 S. C. 318, 323, 53 Am. Rep. 681; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373; *Wheeling v. Black*, 25 W. Va. 266.

⁷⁸ *Clare v. State*, 5 Iowa, 509; *Solomon v. Hughes*, 24 Kan. 211; *City of Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373; *March v. Commonwealth*, 12 B. Mon. (Ky.) 25; *Strauss v. Conneaut*, 23 Ohio C. C. 320.

the ordinance is before them. The statutes invariably provide a safe and easy method by which the proof may be made. In Colorado, a very temperate expression of the law is in these words: "Some, however, hold that when such prosecutions are begun before municipal courts as was this, those courts will judicially notice these ordinances, and, being thus advised of their terms, will enforce penalties, if the case is otherwise made out. They do not agree, however, respecting the duty of courts to which the case may be taken on appeal. Some incline to the opinion that, as the courts where the case was begun are bound to take judicial notice of the ordinance under which the prosecution is laid, if the case is triable *de novo*, the appellate court will pursue the same practice, and are bound by the same rule. The general weight of authority, however, is against this contention. Most of them hold that, where the case goes up on appeal, although it may be triable *de novo*, the procedure in appellate courts must be what it would have been had the case been originally begun in the jurisdiction."⁷⁹ But if statutes, purely private or of another state, or municipal ordinances are *incorporated into a public statute* of the state or act of Congress, they thereby become public and subjects of judicial notice.⁸⁰ And the same rule applies if a statute directs that judicial notice be taken of an ordinance.⁸¹

⁷⁹ Dill, Mun. Corp., § 413; Horr. & B. Mun. Ord., § 184 et seq.; Shan-felter v. City of Baltimore, 80 Md. 483, 27 L. R. A. 648, 31 Atl. 439; City of St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; Green v. City of Indianapolis, 22 Ind. 192; City of Winona v. Burke, 23 Minn. 254; McIntosh v. City of Pueblo, 9 Colo. App. 460, 48 Pac. 969; Garland v. Denver, 11 Colo. 534, 19 Pac. 460; Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1; Central Sav. Bank v. Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; Steiner v. State, 78 Neb. 147, 110 N. W. 723. See, also, Gay

v. Eugene, 53 Or. 289, 18 Ann. Cas. 188, 100 Pac. 306, and Louisiana cases from Hassard v. Municipality No. 2, 7 La. Ann. 495, to State v. Judge Crim. Dist. Ct., 105 La. 758, 30 South. 105.

⁸⁰ Flanigen v. Washington Ins. Co., 7 Barr. (Pa.) 306; Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1.

⁸¹ Unless expressly directed by statute, neither this court nor the superior court can take judicial cognizance of a municipal ordinance; hence an exception to a judgment rendered by a municipal court, which alleges in general terms that the

§ 117 (118). Character and existence of statutes, a question for the court.—It becomes necessary to inquire what form the judicial notice of a statute takes, and the extent of that notice as to conditions precedent to the enactment. It is not the province of the court to determine only whether a given act is a public act or a private act, but whether that act has been legally enacted, and in this latter regard, equally wide and important constitutional results are involved. The question how far courts must treat an enrolled bill as conclusive of the existence of the law, including the regularity and validity of its passage through all necessary stages, is one of some difficulty. The conclusion which will be reached depends upon the line of argument adopted. One of two different premises is usually adopted as a basis for the decision. Either of these seems perfectly proper, and the one will be adopted which at the time seems most important. But the arguments from them lead inevitably to opposite conclusions. The one premise is that the constitution is binding on the legislature, and that unless its provisions are complied with the legislative acts will fail. The other is that the legislature is a co-ordinate branch of the government, and that it must be presumed to obey its conscience and do its duty, and its assertion that it has done so in the manner usually adopted is conclusive of that fact. Of course, if the constitution requires the evidence of proper action to be preserved, its absence may be fatal to the law.⁸² For the latter purpose

judgment is contrary to law (the point intended to be made being that the judgment was contrary to an alleged ordinance), cannot be considered, when the ordinance in question does not appear in the record: *Moore v. Mayor of Jonesboro*, 107 Ga. 704, 33 S. E. 435. See, also, *Woolley v. Louisville*, 24 Ky. Law Rep. 1357, 71 S. W. 893; *Central Sav. Bank v. Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; *Winona v. Burke*, 23 Minn. 254; *Cox v. St. Louis*, 11 Mo.

431; *Harker v. Mayor of New York*, 17 Wend. (N. Y.) 199; *Craddick v. State*, 48 Tex. Cr. 385, 88 S. W. 347 (when special option laws put into operation). See, also, note on judicial notice of local option elections, to *Gay v. City of Eugene*, in 18 Ann. Cas. 191.

⁸² Note on the conclusiveness of enrolled bills appended to *State v. Jones* (6 Wash. 452, 34 Pac. 201), 25 L. R. A. 340. This note shows, among many other valuable authori-

the powers of courts in this country are much less restricted than in England. When an act of Parliament is duly and finally enrolled, such enrollment becomes a record importing absolute verity. No court can question the power of Parliament or listen to any impeachment of the record. The only inquiry is, whether such record exists.⁸³ In this country it is usual for the state constitutions to prescribe certain modes of procedure in the enactment of statutes; and in such cases, since the constitution is the fundamental law, there must be compliance with the constitutional provision. When the constitution provides for the keeping of legislative journals, such journals constitute a record. Although the laws published by authority are, as a matter of course,⁸⁴ presumed to be correct, yet in many

ties collected, how far journals of the House may establish a law for which no enrolled bill is found, and incidentally affords another argument on the question of how far judicial notice of such a bill should be stretched.

⁸³ *The Prince's Case*, 4 Coke, 145-194.

⁸⁴ *Perry Co. v. Selma R. R. Co.*, 58 Ala. 546; *Stein v. Leeper*, 78 Ala. 517; *Moog v. Randolph*, 77 Ala. 597; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Worthen v. Badgett*, 32 Ark. 496; *Burr v. Ross*, 19 Ark. 250; *French v. State*, 146 Cal. 604, 2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031; *State v. Hocker*, 36 Fla. 358, 18 South. 767; *Supervisors v. People*, 25 Ill. 181; *People v. Loewenthal*, 93 Ill. 191; *In re Vanderberg*, 28 Kan. 243; *State v. Francis*, 26 Kan. 724; *In re Howard County*, 15 Kan. 194; *Barnard v. Gall*, 43 La. Ann. 959, 10 South. 5; *Legg v. Annapolis*, 42 Md. 203; *Berry v. Baltimore etc. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Hart v. McElroy*, 72 Mich. 446, 2 L. R. A. 609, 40 N. W. 750; *Attorney General v. Rice*, 64 Mich. 385, 31 N.

W. 203; *People v. Mahaney*, 13 Mich. 481; *McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *State v. Mead*, 71 Mo. 266; *State v. Frank*, 61 Neb. 679, 85 N. W. 956; *Webster v. Hastings*, 56 Neb. 669, 77 N. W. 127; *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; *Opinion of Justices*, 52 N. H. 622; *Opinion of Justices*, 35 N. H. 579; *People v. Chenango*, 8 N. Y. 317; *Commercial Bank v. Sparrow*, 2 Denio (N. Y.), 97; *Purdy v. People*, 4 Hill (N. Y.), 384; *People v. Briggs*, 50 N. Y. 553; *Miller v. State*, 3 Ohio St. 475; *Speer v. Plank Road Co.*, 22 Pa. 376; *Southwark Bank v. Commonwealth*, 26 Pa. 446; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Somers v. State*, 5 S. D. 321, 58 N. W. 804; *Williams v. State*, 6 Lea (Tenn.), 549; *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *In re Welman*, 20 Vt. 653, 29 Fed. Cas. No. 17,407; *Wise v. Bigger*, 79 Va. 269; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Dane County v. Reindahl*, 104 Wis. 302,

decisions, and probably by the weight of authority, it is held that the court will, if it becomes necessary, take judicial cognizance of such journals for the purpose of ascertaining whether the statute has been enacted in the mode prescribed by the constitution. According to this view the due *authentication and enrollment* of the statute affords only *prima facie* evidence of its passage, which may be overcome by examination of the legislative journals.⁸⁵ But there is a series of decisions based on somewhat different constitutional provisions which maintain that the court cannot go behind the enrollment which is authenticated by the proper officers of state.⁸⁶ And these decisions are of great weight and entitled to serious consideration. The support given by the United States supreme court in a great measure minimizes the weight of authority against them. By the supporters of both propositions it is conceded that a bill, signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed

80 N. W. 438; *In re Ryan*, 80 Wis. 414, 50 N. W. 187; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185; *Bound v. Wisconsin Cent. Ry. Co.*, 45 Wis. 543; *State v. Schnitger*, 16 Wyo. 479, 95 Pac. 698; *Blake v. New York Nat. City Bank*, 23 Wall. (U. S.) 307, 23 L. Ed. 119; *Gardner v. The Collector*, 6 Wall. (U. S.) 499, 18 L. Ed. 890.

⁸⁵ See cases last cited; also *Bowen v. Missouri Pac. Ry. Co.*, 118 Mo. 541, 24 S. W. 436; *In re Granger*, 56 Neb. 260, 76 N. W. 588. See, also, *State v. Joseph* (Ala.), 57 South. 942.

⁸⁶ *Bender v. State*, 53 Ind. 254; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377; *People v. Commissioners*, 54 N. Y. 276, 13 Am. Rep. 581; *Green v. Weller*, 32 Miss. 650; *State Lottery Co. v. Richoux*, 23 La. Ann.

743, 8 Am. Rep. 602; *Pacific Ry. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec. 673; *State v. Beck*, 25 Nev. 68, 56 Pac. 1008; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *State v. Jones*, 2 Wash. 662, 26 Am. St. Rep. 897, 27 Pac. 452; *Field v. Clarke*, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495; *United States v. Ballin*, 144 U. S. 1, 36 L. Ed. 321, 12 Sup. Ct. Rep. 507; *Harwood v. Wentworth*, 162 U. S. 547, 40 L. Ed. 1069, 16 Sup. Ct. Rep. 890. See note to *State v. Jones*, 23 L. R. A. 340 et seq.; *Grob v. Cushman*, 45 Ill. 119; *Coleman v. Dobbins*, 8 Ind. 156; *Auditor v. Haycraft*, 14 Bush (Ky.), 284; *Burt v. Winona etc. R. Co.*, 31 Minn. 472, 18 N. W. 285; *Erford v. City of Peoria*, 229 Ill. 546, 82 N. E. 374.

by Congress, does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress. But this concession only leads to the main question, which is the nature of the evidence upon which a court may act when the issue is made as to whether a bill asserted to have become law was or was not passed by Congress. Says Mr. Justice Harlan:⁸⁷ "We cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law. . . . As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the Act, so authenti-

⁸⁷ Field v. Clark, *supra*.

cated, is in conformity with the Constitution.”⁸⁸ Then the contention is raised that such an act cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the proper officers and approved by the President, because it would be thus made possible that a bill that never passed Congress might be given the force of law. As the learned and late lamented justice referred to said, the possibility is too remote to be seriously considered. “It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two Houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government.”⁸⁹ The evils that may result from the recognition

⁸⁸ The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officer to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable: *Field v. Clark, supra*.

⁸⁹ *Field v. Clark, supra*. In the report of this celebrated case, the cases cited by the court and the counsel for the parties contain practically

all the authorities on the points under discussion. From the briefs of the counsel of appellees, Attorney General W. H. Miller and Solicitor General Wm. H. Taft, we extract a list of the authorities by states upon the question whether the legislative journals could be used to impeach the completely enrolled act, duly recorded and authenticated.

Alabama: In Alabama it is held that the validity of the seeming acts may be inquired into, and the presumption from due enrollment overthrown by the journals: *Dew v. Cunningham*, 28 Ala. 471, 65 Am. Dec. 362; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Buckley*, 54 Ala. 599; *Harrison v. Gordy*, 57 Ala. 49; *Perry County v. Selma, M. & M. R. Co.*, 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 361; *Sayre v. Pollard*, 77 Ala. 608; *Abernathy v. State*, 78 Ala. 411; *Stein v. Leeper*, 78 Ala.

of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the pre-

517; *Hall v. Steele*, 82 Ala. 562, 2 South. 650.

Arkansas: In Arkansas the journals control the enrolled act: *Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knoz*, 27 Ark. 266; *English v. Oliver*, 28 Ark. 317; *State v. Little Rock, M. R. & T. R. Co.*, 31 Ark. 701; *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17; *State v. Crawford*, 35 Ark. 237; *Chicot County v. Davies*, 40 Ark. 200; *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 297; *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882. It is noticeable that in the last case, and in two previous cases, the judges delivering the opinions intimate a wish that the English rule were in force.

California: In California the rulings have been various. In *Fowler v. Pierce*, 2 Cal. 165, the court permitted oral evidence to be introduced to show that an act was approved by the governor after adjournment. This case was overruled in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, where it was held that the enrolled act could not be impeached by the journals. This was followed in *People v. Burt*, 43 Cal. 560. After these two cases were decided a new constitution was adopted in California, under which the journals have been examined to impeach the enrolled bill: *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. 722, 8 Saw. 238; *Weill v. Kenfield*, 54 Cal. 111; *Oakland Pav. Co. v. Hilton*, 69 Cal. 481, 11 Pac. 3; *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140.

Colorado: In Colorado the journals control the enrolled act: *In re Roberts*, 5 Colo. 528; *Hughes v. Felton*, 11 Colo. 489-492, 19 Pac. 444.

Connecticut: In Connecticut the journals cannot be used to impeach the recorded act: *Eld v. Gorham*, 20 Conn. 8.

Dakota Territory: In Territory v. O'Connor, 5 Dak. 397, 3 L. R. A. 355, 41 N. W. 746, it was held that the certificate of the presiding officers to the passage of the bill would not be overthrown by the mere silence of the journals. The question of a conflict between the enrolled act and the journals was not considered.

Delaware: We have found no cases in this state in which the question is raised.

Florida: In this state the journal may be resorted to to impeach the enrolled act: *State v. Brown*, 20 Fla. 407; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 South. 899.

Georgia: So far as our examination has extended, there are no cases on the subject in Georgia.

Idaho: No cases found on the subject.

Illinois: In this state the journals control in any conflict between them and the enrolled act as to the validity thereof: *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151; *People v. Hatch*, 19 Ill. 283; *Prescott v. Illinois & M. Canal Trustees*, 19 Ill. 324; *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Schuyler County Suprs. v. People*, 25 Ill. 183; *Wabash R. Co. v. Hughes*, 38 Ill. 174; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *People v. De*

siding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was

Wolf, 62 Ill. 253; *Hensoldt v. Petersburgh*, 63 Ill. 157; *Ryan v. Lynch*, 68 Ill. 160; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Miller v. Goodwin*, 70 Ill. 659; *Plummer v. People*, 74 Ill. 361; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *Binz v. Weber*, 81 Ill. 288; *People v. Loewenthal*, 93 Ill. 191; *Wenner v. Thornton*, 98 Ill. 156; *Burrit v. Commissioners of State Contracts*, 8 West. Rep. 465, 120 Ill. 322, 11 N. E. 867; *Leach v. People*, 10 West Rep. 617, 122 Ill. 420, 12 N. E. 726; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Post v. Kendall County Suprs.*, 105 U. S. 667, 12 L. Ed. 1204.

Indiana: In Indiana, now, the journals do not control the enrolled act. Formerly they were consulted for the purpose of impeaching the act. The journals were referred to in *Skinner v. Deming*, 2 Ind. 560, 54 Am. Dec. 463; *Coleman v. Dobbins*, 8 Ind. 156; *McCulloch v. State*, 11 Ind. 430; *Coburn v. Dodd*, 14 Ind. 347. The rule was changed and the enrolled act held conclusive of its valid passage: *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Edger v. Randolph County Commrs.*, 70 Ind. 331; *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274.

Iowa: In Iowa the enrolled act in the Secretary of State's office is held to be the ultimate proof of the law: *Clare v. State*, 5 Iowa, 510; *Duncombe v. Prindle*, 12 Iowa, 1. Where the validity of a constitutional amendment was in question as different provisions of the constitution applied, it was held that the

journals could be consulted: *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609.

Kansas: In Kansas the enrolled act is controlled by the journals: *Haynes v. Heller*, 12 Kan. 384 (reporter's note); *Division of Howard County*, 15 Kan. 194; *Leavenworth County Commrs. v. Higginbotham*, 17 Kan. 62; *In re Constitutional Prohibitory Amendment*, 24 Kan. 700; *State v. Francis*, 26 Kan. 724; *In re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *State v. Robertson*, 41 Kan. 200, 21 Pac. 382,

Kentucky: In Kentucky the question has not been squarely decided whether the journals in a conflict would overcome the presumption of the enrolled act, but the intimation of the court is that it would: *Commonwealth v. Jackson*, 5 Bush (Ky.), 680; *Auditor v. Haycraft*, 14 Bush (Ky.), 284.

Louisiana: In this state it is held that the enrolled act is conclusive: *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602; *Whited v. Lewis*, 25 La. Ann. 568.

Maine: In this state the enrolled act is held to be the best evidence, and not to be overcome by the journals where its record is complete: *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325.

Maryland: In this state the enrolled act was at first held to be conclusive. Afterward the decisions are that it may be impeached by the journals. The first series of cases is: *Fouke v. Fleming*, 13 Md. 412; *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161. Under a new constitution the following cases held

passed by Congress, according to the forms of the constitution, would be far less than those that would certainly

that the enrolled act might be impeached by the journals and other evidence: *Berry v. Baltimore & D. P. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Strauss v. Heiss*, 48 Md. 292.

Massachusetts: In this state no cases have been found bearing on the subject.

Michigan: In this state the enrolled act is controlled by the entries on the journals: *Southworth v. Palmyra & J. R. Co.*, 2 Mich. 287; *Green v. Graves*, 1 Doug. (Mich.) 351; *Hurlbut v. Britain*, 2 Doug. (Mich.) 191; *People v. Mahaney*, 13 Mich. 481; *People v. Supervisor of Onondaga*, 16 Mich. 254; *Steckert v. East Saginaw*, 22 Mich. 104; *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806; *Callaghan v. Chipman*, 59 Mich. 610, 26 Pac. 806; *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203; *People v. McElroy*, 72 Mich. 446, 2 L. R. A. 609, 40 N. W. 750; *Sackrider v. Saginaw County Suprs.*, 79 Mich. 59, 44 N. W. 165; *Stow v. Grand Rapids*, 79 Mich. 595, 44 N. W. 1047; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Caldwell v. Ward*, 83 Mich. 13, 46 N. W. 1024; *People v. Burch*, 84 Mich. 408, 47 N. W. 765.

Minnesota: In this state it is held that the journals control the enrolled act: *Ramsey County Suprs. v. Heenan*, 2 Minn. 330; *State v. Hasting*, 24 Minn. 78; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 12 N. W. 285, 289; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *Lincoln v. Hangan*, 45 Minn. 451, 48 N. W. 196.

Mississippi: In this state the enrolled act is held conclusive. In one case a different rule was laid down,

in the case of *Brady v. West*, 50 Miss. 68. The case was overruled. The following cases hold the law conclusive: *Green v. Weller*, 32 Miss. 650; *Green v. Weller*, 33 Miss. 735 (appendix); *Swann v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

Missouri: In this state the enrolled act was at first held conclusive, though where an amendment to the constitution was in question the journals were consulted: *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636. The following case held the enrolled act to be conclusive: *Pacific R. Co. v. Governor*, 23 Mo. 353, 66 Am. Dec. 673. Upon a change of the constitution the legislative journals have been allowed to impeach the recorded act: *Bradley v. West*, 60 Mo. 33; *State v. Mead*, 71 Mo. 266.

Montana: In this state no cases have been found on the subject.

Nebraska: In this state journals are used to impeach the enrolled act: *Hull v. Miller*, 4 Neb. 503; *State v. Liedtke*, 9 Neb. 468, 4 N. W. 61; *Cottrell v. State*, 9 Neb. 128, 1 N. W. 1008; *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3; *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; *State v. Robinson*, 20 Neb. 96, 29 N. W. 246; *In re Groff*, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426; *State v. Van Duyn*, 24 Neb. 586, 39 N. W. 612.

Nevada: In this state the enrolled act is held conclusive: *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 39, 1 Pac. 186. In *State v. Tuffy*, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835, where the constitution required an amendment to be entered in full on

result from a rule making the validity of congressional enactments depend upon the manner in which the jour-

the journals, an amendment was held invalid because the requirements were not complied with.

New Hampshire: In this state the enrolled act is controlled by the journals: *Opinions of Justices*, 35 N. H. 579; *Opinion Declaring Soldiers Voting Bill*, 45 N. H. 607; *Opinions of Justices*, 52 N. H. 622.

New Jersey: In this state the enrolled act is held to be the most appropriate evidence of the law, and is not overcome by inconsistent entries in the journals: *State v. Young*, 32 N. J. L. 29; *Passaic County Freeholders v. Stevenson*, 46 N. J. L. 173; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733.

New York: In New York the Revised Statutes (1 Rev. Stats. 187, §§ 10, 11) provided that the Secretary of State should receive the enrolled act, and should indorse upon it the day, month, and year when the same became law, and that his certificate should be conclusive of the facts stated therein. There was also a provision that no bill should be deemed to be passed by the assent of two-thirds of the members, unless the fact was certified by the presiding officer of each House. The question arose in a number of cases whether certain acts had been passed which were acts of incorporation and were required by the constitution of New York to be adopted by a two-thirds vote. It was held that for the purpose of ascertaining the vote, recourse might be had to the original enrolled act on file in the Secretary of State's office, and that the absence of the certificate of the presiding officers to a two-thirds vote avoided the act: *Thomas v. Dakin*, 22

Wend. (N. Y.) 9; *Warner v. Beers*, 23 *Wend. (N. Y.) 103*; *Hunt v. Van Alstyne*, 25 *Wend. (N. Y.) 605*; *People v. Purdy*, 2 *Hill (N. Y.) 31*; *Purdy v. People*, 4 *Hill (N. Y.) 384*; *De Bow v. People*, 1 *Denio (N. Y.) 14*; *Commercial Bank of Buffalo v. Sparrow*, 2 *Denio (N. Y.) 97*. It was also stated by one or two judges in a *semble* (*Warner v. Beers*, 23 *Wend. (N. Y.) 103*; *Purdy v. People*, 4 *Hill (N. Y.) 384*; *De Bow v. People*, 1 *Denio (N. Y.) 14*) that the journal might also be examined, but these dicta have not been followed. The present law in New York is that the journals cannot be consulted to determine whether an act has been passed by the requisite vote: *People v. Chenango Suprs.*, 8 N. Y. 317, 327, 328; *People v. Devlin*, 33 N. Y. 269, 283, 88 Am. Dec. 377; *People v. Marlborough Highway Commrs.*, 13 Am. Rep. 581, 54 N. Y. 276. In the case of *People v. Petrea*, 92 N. Y. 128, where the constitution required that all acts, like the act in question, to be valid must be reported by a commission, it was held that the journal might be resorted to to show that the act was not reported by the commission. This view grew out of a peculiar provision of the constitution, and does not take New York out of the line of those states which hold that the enrolled act cannot be impeached by entries upon the journals.

North Carolina: In North Carolina it is held that the enrolled act is conclusive: *Brodnax v. Groom Commrs.*, 64 N. C. 244; *State v. Robinson*, 81 N. C. 409.

Ohio: In this state the journals are permitted to control the enrolled act: *State v. Moffitt*, 5 Ohio, 358;

nals of the respective Houses are kept by the subordi-

Miller v. State, 3 Ohio St. 475; State v. Smith, 44 Ohio St. 349, 4 West. Rep. 101; State v. Kieseewetter, 10 West. Rep. 495, 45 Ohio St. 524, 15 N. E. 208.

Oregon: In this state the journals control the enrolled act: Mumford v. Sewall, 11 Or. 67-71, 50 Am. Rep. 462, 4 Pac. 585; State v. Wright, 14 Or. 365, 12 Pac. 708.

Pennsylvania: In this state, while the question is not clearly settled, the tendency of the decisions is toward the conclusiveness of the enrolled act: Speer v. Plank-Road Co., 22 Pa. 376; Southwark Bank v. Commonwealth, 26 Pa. 446; Kilgore v. Magee, 85 Pa. 412; Commonwealth v. Martin, 107 Pa. 185. In Southwark Bank v. Commonwealth the journals were consulted to determine which of two bills passed first. In Commonwealth v. Martin, the presiding judge of the lower court declined to look into the journals, following State v. Young, and the case was decided by the supreme court without examining the journals.

Rhode Island: In this state we have found no cases on the subject.

South Carolina: In this state the journals are permitted to control the presumption from the enrolled act: State v. Platt, 2 S. C. 150, 16 Am. Rep. 647; State v. Smalls, 11 S. C. 262; Bond Debt Case, 12 S. C. 200; State v. Hagood, 13 S. C. 46.

Tennessee: In Tennessee the journals are permitted to control the presumption from the enrolled act: State v. McConnell, 3 Lea (Tenn.), 332; Gaines v. Horrigan, 4 Lea (Tenn.), 608; Williams v. State, 6 Lea (Tenn.), 549; Brewer v. Huntington, 86 Tenn. 732, 9 S. W. 166; State v. Algood, 87 Tenn. 163, 10 S. W. 310.

Texas: In Texas the enrolled act is held to be the best evidence and is not controlled by the journals: Central R. Co. v. Hearne, 32 Tex. 546; Blessing v. Galveston, 42 Tex. 641; Houston & T. C. R. Co. v. Odum, 53 Tex. 343; Day Land & C. Co. v. State, 68 Tex. 625, 4 S. W. 865; Usener v. State, 8 Tex. App. 177; Hunt v. State, 22 Tex. App. 396, 3 S. W. 233; Ex parte Tipton, 28 Tex. App. 438, 8 L. R. A. 326, 13 S. W. 610. In Hunt v. State, *supra*, the journals were examined, but Ex parte Tipton practically overrules that case, and restores to authority Usener v. State, which held the enrolled act conclusive.

Vermont: In this state there is no decision by the supreme court of the state. Judge Prentiss, of the United States district court, in Re Welman, 20 Vt. 656, Fed. Cas. No. 17,407, expressed the opinion that the enrolled act was the only proper evidence, not only of its existence as a law, but of the time of its commencement, "though it may be necessary and admissible in some instances, particularly when an act becomes a law by not being signed or returned with objections, or by being returned and repassed by Congress to carry back the inquiry to the legislative journals."

Virginia: In this state the enrolled act is not conclusive, and the journals are permitted to control the presumption therefrom: Wise v. Bigger, 79 Va. 269.

Washington: In this state we have found no cases on the subject.

West Virginia: In this state the enrolled act is controlled by entries upon the journals: Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin: In this state the presumption from the enrolled act is

nate officers charged with the duty of keeping them.⁹⁰ In a later case⁹¹ Mr. Justice Brewer said that even assuming that reference might be had to the journals, and that the facts which the constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet if reference may be had to such journal, it must be assumed to speak the truth. It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment.⁹² And in a still later case, Mr. Justice Harlan emphasized his previous opinion, and said that if the principle he supported involved any element of danger to the public, it was competent for Congress to overcome it by declaring under what circumstances or by what kind of evidence an enrolled act of Congress or of a territorial legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it is committed by statute, may be shown not to be in the form in which it was when passed by Congress or by the territorial legislature. Although it is proper for the parties to call the attention of the court to the legislative journals when the inquiry as to the existence of the statute arises, this is not necessary; nor is it necessary to form any *issue* on such question, for the question of the existence of a statute is a judicial one, of which the court will take notice.⁹³ Although the courts

controlled by the journals: *Watertown v. Cady*, 20 Wis. 501; *Bound v. Wisconsin C. R. Co.*, 45 Wis. 543; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412.

Wyoming: In this state the presumption from the enrolled act is controlled by the journals: *Brown v. Nash*, 1 Wyo. 85; *Union Pac. R. Co. v. Carr*, 1 Wyo. 96.

⁹⁰ *Field v. Clark*, *supra*.

⁹¹ *United States v. Ballin*, *supra*.

⁹² *Harwood v. Wentworth*, *supra*.

⁹³ *Larrison v. Railroad Co.*, 77 Ill. 11; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *People v. Supervisors*, 8 N. Y. 317; *Gardner v. Collector*, 6 Wall. (U. S.) 499, 18 L. Ed. 890; *Dane Co. v. Reindahl*, 104 Wis. 302, 80 N. W. 438.

will take notice of the *contents of the journals* of the two Houses of the legislature far enough to determine whether an act published as a law was actually passed in accordance with the requirements of the constitution, they will go no further; when it appears that an act has been so passed, no inquiry will be permitted to ascertain whether the two Houses have or have not complied strictly with their own rules in their procedure on the bill, intermediate its introduction and final passage.⁹⁴ And as we have already shown, when reference is so made, the journal must be assumed to speak the truth. The possibility of errors in it only still further suggests the unreliability of the evidence, and the danger of appealing to it to overthrow that furnished by the act duly enrolled and authenticated.⁹⁵ The court will take judicial notice of the statutes and laws of the state, although they are in conflict with the allegations of the pleadings,⁹⁶ as well as of the fact that the statutes are amended,⁹⁷ repealed, or suspended and of the time of such repeal.⁹⁸ Accordingly, those are not facts on which issue can properly be joined.⁹⁹ In summarizing this section, it seems to us that the position of regarding the act as it purports to have been passed as merely *prima facie* evidence of the law, and open to the general rear attack for failure of precedent conditions, while it may be a convenient method of dealing with the difficult constitutional interpretation involved and while it does certainly carry

⁹⁴ McDonald v. State, 80 Wis. 407, 50 N. W. 185. See note to People v. Braun, 20 Ann. Cas. 449, and to People v. McElroy, 2 L. R. A. 612. In Maine, the courts have refused to judicially notice legislative "resolves": Kingman v. Penobscot Co. Commrs., 105 Me. 187, 73 Atl. 1038.

⁹⁵ United States v. Ballin, *supra*.

⁹⁶ State v. Jarrett, 17 Md. 309.

⁹⁷ State v. Hoeflinger, 31 Wis. 257; Buell v. Warner, 33 Vt. 570; Denver etc. R. Co. v. Wagner, 167 Fed. 75, 92 C. C. A. 527.

⁹⁸ Griffin v. Eaves, 114 Ga. 65, 39 S. E. 913; State v. O'Conner, 13 La. Ann. 486; Inhabitants of Springfield v. Worcester, 2 Cush. (Mass.) 52; Hawthorne v. Mayor of Hoboken, 32 N. J. L. 172; Stephens & Condit Transp. Co. v. Central R. Co., 33 N. J. L. 229; East Tenn. Iron Co. v. Gaskell, 2 Lea (Tenn.), 742; State v. Hoeflinger, *supra*.

⁹⁹ Smith v. Janesville, 52 Wis. 680, 9 N. W. 789.

an unquestioned weight of authority behind it, is untenable not only for the reasons given by the eminent judges named above, but also that it derogates materially from that dignity which should attend the law-making power, and drags to the level of men who need watching, the highest officials of the state and the realm, whose election to and tenure of office should carry with them that guaranty of good faith and honesty and integrity which the people of the country demand of and justly repose in their elected chiefs.

§ 118 (119). **Private statutes.**—So far, the public domestic statutes have been dealt with and the measure of judicial notice of them taken. From the preceding discussion and authorities it is evident that, in the absence of statutory provisions, what are called private statutes must be proved by appropriate evidence like other facts. They relate to only a limited number of persons and are not matters of such notoriety as to be presumed to be within the knowledge of the court.¹⁰⁰ Private acts are thus

¹⁰⁰ *Mobile v. Louisville etc. R. Co.*, 124 Ala. 132, 26 South. 902; *Kelly v. Alabama etc. R. Co.*, 58 Ala. 489; *Broad St. Hotel v. Weaver*, 57 Ala. 26; *Miller v. Johnson*, 71 Ark. 174, 72 S. W. 371; *Ellis v. Eastman*, 32 Cal. 447; *Minck v. People*, 6 Ill. App. 127; *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Toledo etc. R. Co. v. Nordyke*, 27 Ind. 95; *Danville etc. Plank Road Co. v. State*, 16 Ind. 456; *State v. Trustees Vincennes University*, 5 Ind. 77; *Atchison etc. R. Co. v. Blackshire*, 10 Kan. 477; *Mower v. Kemp*, 42 La. Ann. 1007, 8 South. 830; *Rudd v. Owensboro Deposit Bank*, 105 Ky. 443, 20 Ky. Law Rep. 1276, 1497, 49 S. W. 207, 971; *Mower v. Kemp*, 42 La. Ann. 1007, 8 South. 830; *Workimgmen's Bank v. Converse*, 33 La. Ann. 963; *Kingman v. Commrs.*, 105

Me. 184, 73 Atl. 1038; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Bailey v. Lincoln Academy*, 12 Mo. 174; *Kirby v. Wabash R. Co.*, 85 Mo. App. 345; *Hall v. Brown*, 58 N. H. 93; *State v. Haddonfield etc. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700; *Trenton etc. Co. v. Perdicaris*, 29 N. J. L. 367; *Denver & R. G. R. Co. v. United States*, 9 N. M. 389, 54 Pac. 336; *Gay v. Eugene*, 53 Or. 282, 100 Pac. 254; *Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118; *Pittsburgh etc. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543; *Timlow v. Philadelphia etc. R. Co.*, 99 Pa. 284; *Hestonville etc. R. Co. v. Schuylkill River Pass R. Co.*, 6 Phila. 141; *State v. Sartor*, 2 Strob. (S. C.) 60; *Tilford v. Mayor of Woodbury*, 7 Humph. (Tenn.) 190; *International etc. R. Co. v. Hall*, 35 Tex.

defined by Blackstone: "Special or private acts are rather exceptions than rules, being those which operate only upon particular persons and private concerns, such as the Romans entitled *senatus decreta* (decrees of the senate) in contra-distinction to the *senatus consulta*, (acts of the senate) which regarded the whole community, and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz., ch. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or their lives, is a public Act, being a rule prescribed to the whole body of spiritual persons in the Nation; but an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors, and is, therefore, a private Act."¹ The courts, as we have shown, lean away from the distinction between the two classes of acts, which so great a lawyer as Cooley says cannot be very accurately defined except in the light of adjudications;² and therefore, if any inducement is offered by the condition of the so-called private act, such as if it contain a declaration of its public nature, or if it be partly public and partly private, or if by reference to or by other and general laws (either by recognition, such as amendment or express declaration) it is to be so considered, the courts will regard it as being within the

Civ. App. 545, 81 S. W. 82; Holmes v. Anderson, 59 Tex. 481; Conley v. Columbus Tap R. Co., 44 Tex. 579; Hailes v. State, 9 Tex. App. 170; Pearl v. Allen, 2 Tyler (Vt.), 311; Legrand v. Hampden Sidney College, 5 Munf. (Va.) 324; Hart v. Baltimore etc. R. Co., 6 W. Va. 366; Horn v. Chicago etc. R. Co., 38 Wis. 463; South Carolina v. Coosaw Min. Co., 45 Fed. 804; Leland v. Wilkinson, 6 Pet. (U. S.) 317, 8 L. Ed. 412.

¹ Unity v. Burrage, 103 U. S. 447,

26 L. Ed. 405; 1 Blackstone, 86. For other definitions of "private act," see Ex parte Burke, 59 Cal. 6, 43 Am. Rep. 231; Sasser v. Martin, 101 Ga. 447, 29 S. E. 278; People v. Wright, 70 Ill. 388; Fall Brook Coal Co. v. Lynch, 47 How. Pr. (N. Y.) 520; People v. Palmer, 14 Misc. Rep. 41, 35 N. Y. Supp. 222; State v. Chambers, 93 N. C. 600; Allen v. Hirsch, 8 Or. 412; 2 Burrill's Law Dictionary, 335.

² 1 Cooley's Blackstone, 77, note 1.

scope of their judicial knowledge.³ In some states statutes have been enacted changing the rule in such manner that private as well as public statutes must be judicially noticed.⁴

§ 118a (119). **Statutes of sister states and foreign countries.**—The relations of the several states are those of foreign states in close friendship; and although the courts are presumed to be cognizant of the domestic statutes, there is no such rule as to the statutes of foreign countries or those of *sister states*. Hence if a litigant desires to avail himself of any other statutes or laws than those which govern in the state of the forum, he must be prepared, in the absence of any domestic enactment to the contrary, to prove them.⁵ Thus proof must be given of the laws of

³ *Nimmo v. Jackman*, 21 Ill. App. 607; *Lavalle v. People*, 6 Ill. App. 157; *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130; *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170; *Vance v. Farmers' Bank*, 1 Blackf. (Ind.) 80; *State v. Olinger* (Iowa), 72 N. W. 441; *State v. McAllister*, 24 Me. 139; *People v. River Raisin etc. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *Webb v. Bidwell*, 15 Minn. 479; *Bowie v. Kansas*, 51 Mo. 454; *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23; *Stephens etc. Transp. Co. v. New Jersey Cent. R. Co.*, 33 N. J. L. 229; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154; *Woods v. Durrett*, 28 Tex. 429; *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513, 10 Sup. Ct. Rep. 216; *Beaty v. Knowler*, 4 Pet. (U. S.) 152, 7 L. Ed. 813.

⁴ *Collier v. Baptist Society*, 8 B. Mon. (Ky.) 68; *Durham v. Daniels*, 2 G. Greene (Iowa), 518; *State v. McAllister*, 24 Me. 139; *Hart v. Baltimore Ry. Co.*, 6 W. Va. 336; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Ohio v. Hinchman*, 27 Pa.

479; *People v. Hagar*, 52 Cal. 171. As to mode of proving statutes, see § 501 et seq., *post*. See, also, extended note to *Brown v. Wright*, 21 L. R. A. 467, on the presumptions as to the laws of other states; *Olive v. State*, 4 L. R. A. 41, and to *Cherry v. Sprague*, 67 L. R. A. 34.

⁵ *Johnson v. State*, 88 Ala. 176, 7 South. 253; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 South. 870; *McNeill v. Arnold*, 17 Ark. 154; *Cox v. Morrow*, 14 Ark. 603; *Ryan v. Salmon Co.*, 153 Cal. 438, 95 Pac. 862; *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74, 42 L. R. A. 343, 54 Pac. 143; *In re Campbell*, 12 Cal. App. 707, 108 Pac. 669, 676; *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Hempstead v. Reed*, 6 Conn. 480; *Kinney v. Hosea*, 3 Harr. (Del.) 77; *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 31 L. R. A. 484, 19 South. 172; *Building etc. Assn. v. King*, 48 Fla. 252, 37 South. 181; *Missouri Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93; *Leathe v. Thomas*, 218 Ill. 246, 4 Ann. Cas. 79, 75 N. E.

a sister state or of another country in respect to the laws of which no such domestic legislation exists, as to the rate of

810; *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Baltimore & Ohio S. R. Co. v. McDonald*, 112 Ill. App. 391; *Robards v. Marley*, 80 Ind. 185; *Old Wayne Mut. L. Assn. v. Flynn*, 31 Ind. App. 473, 68 N. E. 327; *Teutonia Loan etc. Co. v. Turrell*, 19 Ind. App. 469, 65 Am. St. Rep. 419, 49 N. E. 852; *Hendryx v. Evans*, 120 Iowa, 310, 94 N. W. 853; *Neese v. Farmers' Ins. Co.*, 55 Iowa, 604, 8 N. W. 450; *Varner v. Interstate Exchange*, 138 Iowa, 201, 115 N. W. 1111; *Ferd. Heim Brewing Co. v. Gimber*, 67 Kan. 834, 72 Pac. 859; *Missouri K. & T. Ry. Co. v. Hutchings*, 78 Kan. 758, 99 Pac. 230; *Bershears v. Distilling Co.*, 80 Kan. 194, 101 Pac. 1011; *Dorsey v. Dorsey*, 5 J. J. Marsh. (Ky.) 280, 22 Am. Dec. 33; *Union Cent. Life Co. v. Dukes*, 132 Ky. 370, 113 S. W. 454; *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 South. 95; *Cumberland Tel. & Tel. Co. v. St. Louis etc. Ry. Co.*, 117 La. 199, 41 South. 492 (overruling *Graham v. Williams*, 21 La. Ann. '594, and *Smith v. McWaters*, 7 La. Ann. 147); *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Baltimore etc. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *Mandru v. Ashby*, 108 Md. 693, 71 Atl. 312; *Washburn Crosby Co. v. Boston etc. R. Co.*, 180 Mass. 252, 62 N. E. 590; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Phelps v. American Sav. etc. Assn.*, 121 Mich. 343, 80 N. W. 120; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *Swing Red River v. Lumber Co.*, 101 Minn. 428, 112 N. W. 393; *Myers v. Chicago R. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; *Brimhall v. Van*

Campen, 8 Minn. 13, 82 Am. Dec. 118; *Hemphill v. Alabama Bank*, 6 Smedes & M. (Miss.) 44; *Southern Illinois etc. Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *Snuffer v. Karr*, 197 Mo. 182, 7 Ann. Cas. 780, 94 S. W. 983; *Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A., N. S., 934. 123 S. W. 441; *McKnight v. Oregon S. L. R. Co.*, 33 Mont. 40, 82 Pac. 661; *People's Bldg. etc. Assn. v. Backus*, 2 Neb. (Unof.) 463, 89 N. W. 315; *Scroggin v. McClelland*, 37 Neb. 644, 40 Am. St. Rep. 520, 22 L. R. A. 110, 56 N. W. 208; *Pickard v. Bailey*, 26 N. H. 152; *Uhlen v. Semple*, 20 N. J. Eq. 288; *Condit v. Blackwell*, 19 N. J. Eq. 193; *Harris v. White*, 81 N. Y. 532; *Hill v. Packard*, 5 Wend. (N. Y.) 375; *Moore v. Coler*, 106 App. Div. 331, 94 N. Y. Supp. 630. But see *Rogers v. McCoach*, 66 Misc. Rep. 85, 120 N. Y. Supp. 686; *Hilliard v. Outlaw*, 92 N. C. 266; *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 1 Ann. Cas. 456, 48 S. E. 642; *Hall v. Southern Ry. Co.*, 146 N. C. 345, 59 S. E. 879; *Smith v. Bartram*, 11 Ohio St. 690; *Pelton v. Platner*, 13 Ohio, 209, 42 Am. Dec. 197; *Lewis v. Kentucky Bank*, 12 Ohio, 132, 40 Am. Dec. 469; *Cressey v. Tatom*, 9 Or. 541; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99; *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705; *Spellier Electric Time Co. v. Geiger*, 147 Pa. 399, 23 Atl. 547; *Ripple v. Ripple*, 1 Rawle (Pa.), 386; *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; *Alkali Co. v. Huhn*, 209 Pa. 238, 58 Atl. 283; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Bridger v. Asheville etc. R. Co.*, 25 S. C. 24; *Whitesides v. Poole*, 9

interest at the place of contract,⁶ of the laws of usury,⁷ of the statutes as to the *distribution of estates*,⁸ or as to the estate of *insolvents*,⁹ of the *liability of stockholders*,¹⁰ and of the statute under which a foreign corporation is chartered.¹¹ Some states have by statute declared that judicial notice shall be taken of the statutes of sister states.¹²

§ 119 (120). **Same—Exceptions to the rule.**—In the method of our treatment of the law of the recognition of the laws of sister states, we have had almost necessarily

Rich. (S. C.) 68; Building Assn. v. Rice, 68 S. C. 236, 1 Ann. Cas. 239, 47 S. E. 63; Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46; Anderson v. May, 10 Heisk. (Tenn.) 84; Bank v. De Berry, 47 Tex. Civ. App. 96, 105 S. W. 998; El Paso etc. R. Co. v. Smith, 50 Tex. Civ. App. 10, 108 S. W. 988; Texas etc. R. Co. v. Miller (Tex. Civ. App.), 128 S. W. 1165; Murtey v. Allen, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; Taylor v. Boardman, 25 Vt. 581; Adams v. Gay, 19 Vt. 358; Union Central L. Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 36 L. R. A. 271, 26 S. E. 421; Bayly v. Chubb, 16 Gratt. (Va.) 284; App v. App, 106 Va. 253, 55 S. E. 672; Land Co. v. Blair, 109 Va. 147, 63 S. E. 751; McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209; Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268; Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Nelson v. Bridgeport, 8 Beav. 527, 10 Jur. 871, 50 Eng. Reprint, 207; Freemoult v. Dedire, 1 P. Wms. 431, 24 Eng. Reprint, 458; Ex parte Cridland, 3 Ves. & B. 99, 35 Eng. Reprint, 415. See the late cases: Horton v. Sherrill-Russell Lumber Co., 147 Ky. 226, 143 S. W. 1053; Schaun

v. Brandt, 116 Md. 560, 82 Atl. 551; Marshall v. Owen (Mich.), 137 N. W. 204; Atchison etc. R. Co. v. Lambert, 32 Okl. 665, 123 Pac. 428; Casner v. Hoskins (Or.), 128 Pac. 841. ⁶ Hosford v. Nichols, 1 Paige (N. Y.), 220; Ramsay v. McCanley, 2 Tex. 189; Holley v. Holley, Litt. Sel. Cas. (16 Ky.) 505, 12 Am. Dec. 342; Campion v. Kille, 15 N. J. Eq. 476; Billingsley v. Dean, 11 Ind. 331.

⁷ Phelps v. American S. & L. Assn., 121 Mich. 343, 80 N. W. 120.

⁸ McDaniel v. Wright, 7 J. J. Marsh. (Ky.) 475.

⁹ Mobile Ry. Co. v. Whitney, 39 Ala. 468.

¹⁰ Eastman v. Crosby, 8 Allen (Mass.), 206.

¹¹ Portsmouth Livery Co. v. Watson, 10 Mass. 91.

¹² F. E. Creelman Lumber Co. v. J. A. Lesh & Co., 73 Ark. 16, 3 Ann. Cas. 108, 83 S. W. 320; Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035. See extended note upon how a case is determined when proper foreign law is not proved, appended to Cherry v. Sprague (187 Mass. 113, 105 Am. St. Rep. 381, 72 N. E. 456), 67 L. R. A. 33, which contains a fine dissertation upon the different theories as to the proper practice and will well repay perusal.

to deal with the subject from the standpoint of the states all springing into existence by the one act. But it must be remembered that to the original number there has been a threefold addition,—territory acquired, states coming into the Union, and states carved out of other territories and states. Out of state A, state B has been created with a new constitution, and in the territory of state B the laws of state A were paramount until the new state was constituted. But the judges of the new state must take judicial cognizance of the laws of the state past and present. Therefore it is that the general rule, requiring proof of the law of a sister state or of a foreign country, is subject to the qualification that the courts of any state are deemed to know the law which prevailed in the state or country, to which its territory formerly belonged, prior to and at the time of the separation. Thus the laws of Mexico of force in Texas previous to the Texan Revolution were the laws, not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them.¹³ The laws and customs prevailing in Louisiana prior to the session to the United States have been judicially noticed. The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that state depend, must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other state. They are questions of law and

¹³ *United States v. Perot*, 98 U. S. 428, 25 L. Ed. 251; *Fremont v. United States*, 17 How. (58 U. S.) 542, 15 L. Ed. 241. In the last-named case, Chief Justice Taney said: "It is proper to remark that the laws of these territories, under which titles were claimed, were never treated by the court as foreign laws to be decided as a question of fact.

It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country."

not questions of fact, and are always so regarded and treated in the courts of Louisiana.¹⁴ And the courts of Kentucky have noticed judicially the former laws of Virginia.¹⁵ The laws of Kansas formerly operative in territory now included in Colorado are judicially noticed by the tribunals of the latter state.¹⁶ Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory. The history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States are matters which must be recognized by the supreme court, just the same as the ancient laws and institutions of many of the states when matters come before it from their several jurisdictions. The court will therefore take judicial notice of the Spanish law so far as it affects the insular possessions referred to. It is *quoad hoc* no longer foreign law.¹⁷ So it has been held that if the laws of one state recognize official acts done in pursuance of the laws of another state, the courts of the former state may likewise take judicial

¹⁴ United States v. Turner, 11 How. (U. S.) 663, 13 L. Ed. 857. Chief Justice Taney said in this case: "It can never be maintained in the courts of the United States that the laws of any state of this Union are to be treated as the laws of a foreign nation, and ascertained and determined as a matter of fact, by a jury, upon the testimony of witnesses. And if the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that state would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdict of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend": Chouteau v. Pierre,

9 Mo. 3; Ott v. Soulard, 9 Mo. 581; United States v. Perot, 98 U. S. 428, 25 L. Ed. 251; United States v. Chaves, 159 U. S. 452, 40 L. Ed. 215, 16 Sup. Ct. Rep. 57; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788, 9 Sup. Ct. Rep. 469; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302. As to the mode of proving statutes of sister states, see § 504, *post*. As to statutes authorizing judicial notice to be taken of the laws of sister states, see note to Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 871.

¹⁵ Holley v. Holley, Litt. Sel. Cas. (16 Ky.) 505, 12 Am. Dec. 342.

¹⁶ Crandall v. Sterling Gold Mining Co., 1 Colo. 106; and see note to State v. Twitty (2 Hawks (N. C.), 441), 11 Am. Dec. 780.

¹⁷ Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 L. Ed. 1068, 28 Sup. Ct. Rep. 737.

notice of such laws in passing upon the validity of such acts;¹⁸ but this holding must be read by the greater light of subsequent cases, which go far to entirely eclipse it. Later cases¹⁹ appear to establish that whenever it becomes necessary, under the requirement of the constitution, for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. The supreme court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in the supreme court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact there.²⁰ In deter-

¹⁸ *Carpenter v. Dexter*, 8 Wall. (U. S.) 513, 19 L. Ed. 426.

¹⁹ *Chicago etc. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 30 L. Ed. 519, 7 Sup. Ct. Rep. 398; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. Ed. 128, 15 Sup. Ct. Rep. 70.

²⁰ *Chicago etc. R. Co. v. Wiggins Ferry Co.*, *supra*. This was expressly decided in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state, and to the public acts of another. The case of *Graham v. Williams*, 21 La. Ann. 594, is not in point, because in that case the statute of the sister state of which judicial cognizance was sought had been already judicially

noticed by the court, and they held they were entitled to continue to use their judicial knowledge. The case just referred to has been overruled by *Cumberland Tel. & Tel. Co. v. St. Louis etc. Ry. Co.*, 117 La. 199, 41 South. 492. Other states also have not followed: *State v. Hinchman*, 27 Pa. 479; *Sammis v. Wightman*, 31 Fla. 10, 12 South. 526; *Taylor v. Runyan*, 9 Iowa, 522; *Knapp v. Abell*, 10 Allen, 485; *Wright v. Andrews*, 130 Mass. 149; *Gill v. Everman*, 94 Tex. 209, 59 S. W. 531; *Osborn v. Blackburn*, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269; *Hunt v. Monroe*, 32 Utah, 428, 11 L. R. A., N. S., 249, 91 Pac. 269. In addition it must be noticed that in the case of *Carpenter v. Dexter*, referred to (note 18, *supra*), it was not a mere naked assertion on the part of the court, but that the hold-

mining the validity of judgments rendered in a sister state, it has been held that the courts will take notice that the constitution of such state creates courts having general and appellate jurisdiction.²¹ And in a Wisconsin case it was held that the courts might without proof take judicial notice that the circuit courts of the several states are courts of general jurisdiction.²² So that with the exception named in favor of mother states, the rule may be taken to be established that whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact.²³

§ 120 (121). **Federal courts—State statutes.**—Subject to our remarks on the gradually decreasing attention that is given to the disappearance of the dividing line between public and private statutes, the judges of the federal courts, like those of the state courts, recognize the distinction between public and private statutes.²⁴ But the federal courts are not created by Congress merely for the purpose of administering the local laws of a single state; and they are bound to take notice of the public acts of the various states of the Union. In this forum the laws of every state are presumed to be known to the court,²⁵ including corpora-

ing reads, "Where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. In this case, also, the laws of New York are, by stipulation of parties, considered as evidence."

²¹ *Butcher v. Brownsville*, 2 Kan. 70, 83 Am. Dec. 446; *Dodge v. Coffin*, 15 Kan. 277.

²² *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560. It was even held in Pennsylvania and Rhode Island that the courts would take notice

of the local laws of the state from which the records came: *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *State v. Hinchman*, *supra*. See *Hanley v. Donoghue*, *supra*, where these cases are criticised. See, also, § 120, *post*.

²³ Mr. Justice Fuller, in *Lloyd v. Matthews*, *supra*, citing *Chicago & A. R. Co. v. Wiggins Ferry Co.*, *supra*, and *Hanley v. Donoghue*, *supra*.

²⁴ *Covington Drawbridge Co. v. Shepard*, 20 How. (U. S.) 227, 15 L. Ed. 896.

²⁵ *Swann v. Swann*, 21 Fed. 299; *Gormley v. Bunyan*, 136 U. S. 623.

tion laws either under a creative or an enabling act,²⁶ and

34 L. Ed. 1086, 11 Sup. Ct. Rep. 453; *Elwood v. Flannigan*, 104 U. S. 562, 26 L. Ed. 842; *Owings v. Hull*, 9 Pet. (U. S.) 607, 9 L. Ed. 246; *Mewster v. Spalding*, 6 McLean (U. S.), 24, Fed. Cas. No. 9513; *Gerling v. Baltimore etc. R. Co.*, 151 U. S. 673, 38 L. Ed. 311, 14 Sup. Ct. Rep. 533; *Bond v. Farwell*, 172 Fed. 58, 96 C. C. A. 546; *Bohlander v. Heikes*, 168 Fed. 886, 94 C. C. A. 298; *Denver v. Wagner*, 167 Fed. 75, 92 C. C. A. 527; *Barry v. Snowden*, 106 Fed. 571; *Hathaway v. New York Mut. Life Ins. Co.*, 99 Fed. 534; *Andruss v. People's Bldg. etc. Assn.*, 94 Fed. 575, 36 C. C. A. 336; *Merchants' Exch. Bank v. McGraw*, 59 Fed. 972, 8 C. C. A. 420; *Knower v. Haines*, 31 Fed. 513, 24 Blatchf. 488; *Jones v. Hays*, 4 McLean, 521, Fed. Cas. No. 7467; *Miller v. McQuerry*, 5 McLean, 469, Fed. Cas. No. 9583; *Toppan v. Cleveland etc. R. Co.*, 1 Flap. 74, Fed. Cas. No. 14,099; *Woodworth v. Spafford*, 2 McLean, 168, Fed. Cas. No. 18,020; *Breed v. Northern Pac. R. Co.*, 35 Fed. 642; and of inferior federal courts: *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132; *Gormley v. Bunyan*, *supra*; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Lamar v. Micou*, 114 U. S. 218, 29 L. Ed. 94, 5 Sup. Ct. Rep. 857; *Mitchell v. Overman*, 103 U. S. 62, 26 L. Ed. 369; *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 19 L. Ed. 604; *Harpending v. New York Reformed Protestant Dutch Church*, 16 Pet. (U. S.) 455, 10 L. Ed. 1029; *Beaty v. Knowler*, 4 Pet. (U. S.) 152, 7 L. Ed. 813.

²⁶ *Burdine v. Grand Lodge*, 37 Ala. 478; *Douglass v. Mobile Branch Bank*, 19 Ala. 659; *Hammett v. Little Rock etc. R. Co.*, 20 Ark. 204;

Washington v. Finley, 10 Ark. 423, 52 Am. Dec. 244; *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. 846; *Wilmington etc. Bank v. Wollaston*, 3 Harr. (Del.) 90; *Jackson v. State*, 72 Ga. 28; *Terry v. Merchants' etc. Bank*, 66 Ga. 177; *Nimmo v. Jackman*, 21 Ill. App. 607; *Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407; *Gordon v. Montgomery*, 19 Ind. 110; *Durham v. Daniels*, 2 G. Greene (Iowa), 518; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 13, 35 Am. Dec. 171; *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256; *Chicago etc. R. Co. v. Liebel*, 27 Ky. Law Rep. 716, 86 S. W. 549; *State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495; *State v. McAllister*, 24 Me. 139; *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176; *Agnew v. Gettysburg Bank*, 2 Har. & G. (Md.) 478; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Jones v. Fales*, 4 Mass. 245; *American Steel etc. Co. v. Bearse*, 194 Mass. 596, 80 N. E. 623; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179; *Hall v. Brown*, 58 N. H. 93; *Haven v. New Hampshire Insane Asylum*, 13 N. H. 532, 38 Am. Dec. 512; *Stephens etc. Transp. Co. v. New Jersey Cent. R. Co.*, 33 N. J. L. 229; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; *Foley v. Ray*, 27 R. I. 127, 61 Atl. 50; *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; *Owen v. State*, 5 Sneed (Tenn.), 493; *Shaw v. State*, 3 Sneed (Tenn.), 86; *Alabama Bank v. Simonton*, 2 Tex.

laws relating to municipal corporations.²⁷ If by the statute or constitutional provision in any state the courts are required to take notice of private statutes, the United States courts sitting within the state will do the same.²⁸ In the exercise of its general appellate jurisdiction the

531; *International etc. R. Co. v. Hall*, 35 Tex. Civ. App. 545, 81 S. W. 82; *Buell v. Warner*, 33 Vt. 570; *State v. Franklin County Sav. Bank etc. Co.*, 74 Vt. 246, 52 Atl. 1069; *Hays v. Northwestern Bank*, 9 Gratt. (Va.) 127; *Stribbling v. Valley Bank*, 5 Rand. (Va.) 132; *State v. Baltimore etc. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803; *Farmers' Bank v. Willis*, 7 W. Va. 31; *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513, 10 Sup. Ct. Rep. 216; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 15 L. Ed. 896; *Beaty v. Knowler*, 4 Pet. (U. S.) 152, 7 L. Ed. 813; *Pennsylvania R. Co. v. Baltimore etc. R. Co.*, 37 Fed. 129. For numerous other cases, see 16 Cyc., "Evidence," 890, 891.

²⁷ *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 South. 478; *State v. Matthews*, 153 Ala. 646, 45 South. 307; *Badgett v. State*, 157 Ala. 20, 48 South. 54; *Bituminous Lime Rock Paving etc. Co. v. Fulton (Cal.)*, 33 Pac. 1117; *Stoner v. Los Angeles*, 8 Cal. App. 607, 97 Pac. 692; *Nicholls v. City of Ansonia*, 81 Conn. 229, 70 Atl. 636; *Downs v. Smyrna*, 2 Penne. (Del.) 132, 45 Atl. 717; *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807; *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896; *State v. Olinger (Iowa)*, 72 N. W. 441; *Solomon v. Hughes*, 24 Kan. 211; *Gifford v. Falmouth*, 4 Ky. Law Rep. 902; *Ball v. Commonwealth*, 30 Ky. Law Rep. 600, 99 S. W. 326; *Belmont v.*

Morrill, 69 Me. 314; *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042; *Peterson v. Cokato*, 84 Minn. 205, 87 N. W. 615; *Shively v. Lankford*, 174 Mo. 535, 74 S. W. 835; *Johnson v. Scott*, 133 Mo. App. 689, 114 S. W. 45; *Scheffer v. Hardin*, 140 Mo. App. 13, 124 S. W. 569; *North Platte Waterworks Co. v. North Platte*, 50 Neb. 853, 70 N. W. 393; *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256; *Hawthorne v. Hoboken*, 32 N. J. L. 172; *Shaw v. New York Cent. etc. R. Co.*, 85 N. Y. App. Div. 137, 83 N. Y. Supp. 91; *Empire Realty Corp. v. Sayre*, 107 App. Div. 415, 95 N. Y. Supp. 71; *State v. Banfield*, 43 Or. 287, 72 Pac. 1093; *Naylor v. McCulloch*, 54 Or. 305, 103 Pac. 68; *Nelson v. Lighting Co.*, 26 R. I. 258, 106 Am. St. Rep. 711, 67 L. R. A. 116, 58 Atl. 802; *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154; *Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405. See, also, *Paris v. Tucker*, 101 Tex. 99, 104 S. W. 1046; *Winooski v. Gokey*, 49 Vt. 282; *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083; *Beasley v. Beckley*, 28 W. Va. 81; *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

²⁸ *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Junction Ry. Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226, 20 L. E. 385; *Merrill v. Dawson*, 1 Hempst. 563, Fed. Cas. No. 9469; *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513, 10 Sup. Ct. Rep. 216.

supreme court of the United States takes notice of the laws of every state; but a different rule governs in a writ of error to the highest court of a state. In that case the United States supreme court does not take notice of such laws unless made a part of the record sent up for revision.²⁹ The law has been practically settled since 1885, when Mr. Justice Gray, in a celebrated case,³⁰ cleared up several of the doubts which had been created by certain other decisions,³¹ and expressed those principles which now guide the United States supreme court. He says: 1. Upon principle, therefore, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. 2. When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. 3. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here; and whatever was matter of fact in the court appealed

²⁹ *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086, 11 Sup. Ct. Rep. 453; *Jasper v. Porter*, 2 McLean (U. S.), 579, Fed. Cas. No. 7229; *Smith v. Tallapoosa*, 2 Woods, 574, Fed. Cas. No. 13,113.

³⁰ *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242.

³¹ *State v. Hinchman*, 27 Pa. 479; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411. See § 119, *ante*. *Hanley v. Donoghue*, *supra*, created an exception to the broad rule laid down in *McNeil v. Holbrook*, 37 U. S. (12 Pet.) 84, 9 L. Ed. 1009.

from is matter of fact here. 4. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof.³² 5. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall:³³ “That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned.” 6. Where by the local law of a state³⁴ its highest court takes judicial notice of the laws of other states, this court also, on writ of error, might take judicial notice of them. This exposition of the learned justice approved in subsequent cases clearly expresses the

³² *Course v. Stead*, 4 Dall. (U. S.) 22, 27, 1 L. Ed. 724, 726; *Hinde v. Vattier*, 5 Pet. (30 U. S.) 398, 8 L. Ed. 168; *Owings v. Hull*, 9 Pet. (34 U. S.) 607, 625, 9 L. Ed. 246, 252; *United States v. Turner*, 11 How. (52 U. S.) 663, 668, 13 L. Ed. 857, 859; *Pennington v. Gibson*, 16 How. (57 U. S.) 65, 14 L. Ed. 847; *Covington Drawbridge Co. v. Shepherd*, 20 How. (61 U. S.) 227, 230, 15 L. Ed. 896; *Cheever v. Wilson*, 9 Wall. (76 U. S.) 108, 19 L. Ed. 604; *Junction R. R.*

Co. v. Bank of Ashland, 12 Wall. (79 U. S.) 226, 230, 20 L. Ed. 385, 387; *Lamar v. Micou*, 114 U. S. 218, 29 L. Ed. 94, 5 Sup. Ct. Rep. 857.

³³ *Talbot v. Seeman*, 1 Cranch, 1, 2 L. Ed. 15. The laws of the Indian tribes are not judicially noticed: *Elliott v. Garvin*, 7 Ind. Ter. 679, 104 S. W. 878.

³⁴ As in Tennessee: *Hobbs v. Memphis & Charleston Railroad*, 9 Heisk. (Tenn.) 873.

law of to-day.³⁵ Since the supreme court of the United States takes judicial notice of the laws of the several states, it becomes necessary for that court to take cognizance of the judicial decisions of the courts of the last resort in such states; and it is a familiar rule that the supreme court will, as a general rule, *follow the construction* placed upon the statute of the state by the supreme court of that state.³⁶ And the same rule prevails, although no reference was made to the statute in the court below.³⁷ The federal courts will also take judicial notice of such federal matters of general public importance as the rules and regulations prescribed by the interior department in respect to contests before the land office, although they are not public statutes within the strict meaning of the term;³⁸ but state courts do not uniformly take judicial notice of such rules and regulations.³⁹ No valid reason exists why they should do so, as the rules and regulations referred to can be so easily put in evidence.⁴⁰

³⁵ *Hanley v. Donoghue*, *supra*, as to the judicial notice of state laws, was approved in *Tilt v. Kelsey*, 207 U. S. 43, 52 L. Ed. 95, 28 Sup. Ct. Rep. 1; *Allen v. Alleghany Co.*, 196 U. S. 464, 49 L. Ed. 555, 25 Sup. Ct. Rep. 311; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. Ed. 128, 15 Sup. Ct. Rep. 70; *Allgair v. Fisher*, 143 Fed. 963, 75 C. C. A. 148; *Leathe v. Thomas*, 218 Ill. 253, 75 N. E. 812; *Edwin v. Southern Ry.*, 71 S. C. 230, 50 S. E. 779; *Thomas v. Board of Trustees*, 195 U. S. 214, 49 L. Ed. 165, 25 Sup. Ct. Rep. 24; *Chicago etc. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 30 L. Ed. 519, 7 Sup. Ct. Rep. 398. See, also, *Thompson's Notes on United States Reports*, Supplement IV.

³⁶ *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Renaud v. Abbott*, 116 U. S. 277, 29 L. Ed. 629, 6 Sup. Ct. Rep. 1194.

³⁷ *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. Ed. 825, 7 Sup. Ct. Rep. 757; *Christy v. Pridgeon*, 4 Wall. (U. S.) 196, 18 L. Ed. 322; *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966, 3 Sup. Ct. Rep. 263.

³⁸ *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513.

³⁹ *Hensley v. Tarpey*, 7 Cal. 288. See *United States v. Williams*, 6 Mont. 379, 12 Pac. 851, referred to in note 40, *post*.

⁴⁰ In *United States v. Williams*, *supra*, the reasons given for the judicial recognition do not carry convincing weight. An analogy is there sought to be established between such rules and the extension of a pardon, or the issuance of a commission or an order removing an officer or the issuance of a land patent: *Patterson v. Winn*, 5 Pet. (U. S.) 241, 8 L. Ed. 108; *Yount v. Howell*, 14 Cal. 463;

§ 121 (122). **The unwritten law.**—Upon every rational ground, the importance of the common law has warranted its inclusion within the scope of judicial recognition. Indeed, the process of making legal deductions could hardly be accomplished without that knowledge, and it is the knowledge of the court apart from the judge. In this particular department of the subject, drawing the attention of the court to the state of the common law on any given subject is merely a reminder to the tribunal that at the period of the creation of the United States the vast body of English common law then in force was adopted by the United States and is in force to-day, subject to such modifications as the wisdom of legislatures has seen fit to effect. Our courts treat the common law, not as the law of a foreign country, but as our own law and as a system which may be adapted to any condition of things, however new, which may arise.⁴¹ “Notice of domestic law involves notice of all the systems of jurisprudence by which such domestic law is limited or otherwise affected. Hence a court is bound to take notice of such subsidiary codes or systems of law as may enter into the law by which it is governed. In submission to this principle judicial notice will be taken

Wetherbee v. Dunn, 32 Cal. 108. What the President does through his cabinet officers may be regarded as an act of the executive department, but the same rule should surely not be extended to what those officers do through their subordinates. It is carrying the presumption too far to ask that it be inferred that the President is cognizant of such acts and approves them. The facilities for bringing such rules before the court as ordinary evidence should obviate further consideration, and if it were otherwise—that such facilities did not exist—then the argument is turned on the ground of the rules not being available for either common or judicial notice.

⁴¹ *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690; *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 South. 95; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Wallace v. Burden*, 17 Tex. 468; *Nimmo v. Davis*, 7 Tex. 26; *Ocean Ins. Co. v. Fields*, 2 Story (U. S.), 59, Fed. Cas. No. 10,406; *Maberley v. Robbins*, 5 Taunt. 625; *Elliott v. Evans*, 3 Bos. & P. 181; *Neeves v. Burrage*, 14 Q. B. 504, 117 Eng. Reprint, 196; *Westoby v. Day*, 2 El. & Bl. 624, 118 Eng. Reprint, 895. See note to *Cherry v. Sprague*, 67 L. R. A. 37.

by common-law courts of equity practice when this is distinct from the common law.”⁴² It is under this rule that the customs and rules of the *law-merchant* and those other *customs* and usages which prevail throughout the country and have become the law, are to be determined by the court and without proof.⁴³ The judicial knowledge is not limited to the particular branch of law which is or was generally administered in a given court, but it covers all branches of the law, including, of course, equity jurisprudence and generally all that may be classed as the common law of the forum.⁴⁴ So the courts take judicial notice of the *ecclesiastical* law of Christendom as part of the common law;⁴⁵ but the notice taken is not to the same extent as in England. Here, however, the language of the constitution is sufficiently comprehensive to protect every variety of religious opinion, and it must have been intended to extend equally to all sects, whether they believe in Christianity or not, and whether they are Jews or infidels. “So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.”⁴⁶ The courts will take notice of the existence of religious denominations, but as matter of com-

⁴² Whart. Ev., § 296.

⁴³ Jewell v. Center, 25 Ala. 498; Reed v. Wilson, 41 N. J. L. 29; Fleming v. McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671; Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143.

⁴⁴ Gaylor's Appeal, 43 Conn. 82; St. Louis etc. R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; Porter v. United States, 7 Ind. Ter. 616, 104 S. W. 855; Squier v. Barnes, 193 Mass. 21, 78 N. E. 731; Southgate v. Montgomery, 1 Paige (N. Y.), 41; Nimmo v. State, 7 Tex. 26; Hanley v. Donoghue, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; Sims

v. Marryat, 17 Q. B. 281, 79 E. C. L. 281, 117 Eng. Reprint, 1287; Westboy v. Day, 2 El. & Bl. 605, 22 L. J. Q. B. 418, 118 Eng. Reprint, 895; Scott v. Brown, [1892] L. R. 2 Q. B. 724, 61 L. J. Q. B. 738; Logan v. Lee, Can. Sup. Ct. 311; Musgrave v. Angle, 43 Can. Sup. Ct. 484.

⁴⁵ 1 Greenl. Ev., § 5.

⁴⁶ Vidal v. Girard's Exrs., 2 How. (U. S.) 127, 198, 11 L. Ed. 205, 234. This was the doctrine of the supreme court of Pennsylvania in Updegraph v. The Commonwealth, 11 Serg. & R. (Pa.) 394.

mon knowledge, the same as the Bible and sacred references, rather than of any inherent claim of the denomination to be noticed.⁴⁷ But the court cannot take judicial notice of the laws of any particular sect. Thus the laws and powers of the Catholic church are not matters of their cognizance;⁴⁸ nor the laws of the Episcopal churches.⁴⁹ The courts do not notice the statutes of England enacted since the Revolution. They must be proved in the usual way.⁵⁰ It will be seen in another section that if a party desires to have the court take cognizance of the *unwritten law of another state*, he should prove such law like any other fact. But the courts, in order to ascertain what the common law would be but for existing statutes, may take notice of *decisions in other states* and in other countries which have adopted the common law of England.⁵¹

⁴⁷ *State v. Chandler*, 2 Harr. (Del.) 553, containing an elaborate and classical opinion of Chief Justice Clayton; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 33 N. E. 777, 44 N. E. 363; *Humphrey v. Burnside*, 4 Bush (Ky.), 215; *Sawyer v. Baldwin*, 11 Pick. (Mass.) 492; *Commonwealth v. Kneland*, 20 Pick. (Mass.) 206; *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158, 37 N. E. 173; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250; *People v. Ruggles*, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; *People v. Powers*, 147 N. Y. 104, 35 L. R. A. 502, 41 N. E. 432; *Updegraph v. Commonwealth*, *supra*; *State v. South Kingston*, 18 R. I. 258, 22 L. R. A. 55, 27 Atl. 599; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660; *State v. Edgerton School Dist.*, 76 Wis. 177, 20 Am. St. Rep. 41, 7 L. R. A. 330, 44 N. W. 967; *Vidal v. Girard's Exrs.*, *supra*; *Pringle v. Napanee*, 14 Can. L. T. 219.

⁴⁸ *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667; *Katzer v. City of Milwaukee*, 104 Wis. 16, 80 N. W. 41.

⁴⁹ *Youngs v. Ransom*, 31 Barb. (N. Y.) 49 (There is no such thing known to our law as institution or induction, and the ecclesiastical law of the mother country is no part of the law under which we live. Before our courts can take notice of such customs, or their nature or effect, their existence should be properly averred and proved as matter of fact. The canons, rubrics or rules of this or any other church among us, are not laws; they are merely regulations for the conduct of its ministers and members, depending for their force upon the vows of the one and the consciences of the other, so far as they are within the limits of the rightful powers of such bodies. We know nothing of them judicially); *Sarahass v. Armstrong*, 16 Kan. 192.

⁵⁰ *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445, 32 L. Ed. 788, 9 Sup. Ct. Rep. 469; *Spaulding v. Chicago Ry. Co.*, 30 Wis. 110, 11 Am. Rep. 550.

⁵¹ *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *St. Louis Ry. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

§ 122 (122). **Executive proclamations—Regulation of bureaus—Official reports of public officers.**—The acts of any of the three great divisions of the government are entitled to equal judicial recognition. It only remains to add that such executive acts as proclamations by the chief executive and reports of public officers are of such general notoriety that they may be judicially noticed. It is true, too, that regulations of bureaus and departments have received judicial cognizance, but the practice is not uniform with regard to them, and, as we have said before,⁵² there is no doubt at all that such regulations are not so brought to the knowledge of the people as to render notice of them sufficiently general, that they should receive recognition by the courts without proof. This is the more especially so, as that proof is not only easy, but the production of the rule or regulation gives both the parties and the court a better opportunity for justice to be done. As to proclamations and the like, on the principle of acknowledgment of the act of a great department of the government, judicial notice is properly and by universal precedent in civilized countries adopted. A conspicuous illustration was the proclamation of President Lincoln granting full amnesty and pardon for the offense of treason to all persons who participated in the rebellion against the United States.⁵³ Thus courts take judicial notice of proclamations of *peace or war*;⁵⁴ of proclamations as to the jurisdiction of the United States;⁵⁵ of the Secretary

⁵² § 120, *ante*. See, also, *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 South. 692, as to judicial cognizance of the records of co-ordinate branches of the state government; *Hartwell R. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310, as to schedule of rates fixed by carrier with Interstate Commerce Commission.

⁵³ *Armstrong v. United States*, 13 Wall. (U. S.) 154, 20 L. Ed. 614. See, also, *Missouri etc. R. Co. v. Savage*, 32 Okl. 376, 122 Pac. 656.

⁵⁴ *Dodder v. Huntingfield*, 11 Ves.

292, 32 Eng. Reprint, 1097; *Sutton v. Tiller*, 6 Cold. (Tenn.) 593, 98 Am. Dec. 471; *Ogden v. Lund*, 11 Tex. 688; *Philips v. Hatch*, 1 Dill. 571, 19 Fed. Cas. No. 11,094; *United States v. Anderson*, 9 Wall. (U. S.) 56, 19 L. Ed. 615; *United States v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958.

⁵⁵ *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *United States v. Lynde*, 11 Wall. (U. S.) 632, 20 L. Ed. 230; *United States v. Yorba*, 1 Wall. (U. S.) 412, 17 L.

of the Treasury paying \$40,000,000 to the Panama Canal Company and \$10,000,000 to the Republic of Panama;⁵⁶ of other public notifications by or on behalf of the chief executive;⁵⁷ of executive documents printed by authority of the federal senate;⁵⁸ of public *proclamations of the governor* of the state;⁵⁹ of *official reports* published by authority of the legislature;⁶⁰ of the rules and *regulations* of the *Land Department* as to sale of public lands;⁶¹ and as to contests on lands;⁶² of payments made by the treasury department;⁶³ of *rules* for the conduct of public business;⁶⁴ and of the report of the board of regents of a university to the governor of the state.⁶⁵

Ed. 635; Williams v. Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. Ed. 226; Garcia v. Lee, 12 Pet. (U. S.) 511, 9 L. Ed. 1176; Keene v. McDonough, 8 Pet. (U. S.) 308, 8 L. Ed. 955; Foster v. Neilson, 2 Pet. (U. S.) 253, 7 L. Ed. 415; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. Ed. 512; United States v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471.

⁵⁶ Wilson v. Shaw, 204 U. S. 24, 51 L. Ed. 351, 27 Sup. Ct. Rep. 233.

⁵⁷ Poheim v. Meyers, 9 Cal. App. 31, 98 Pac. 65; Moss v. Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Dunning v. New Albany etc. R. Co., 2 Ind. 437; State v. Ricksecker, 73 Kan. 495, 85 Pac. 547; Wells v. Missouri Pac. R. Co., 110 Mo. 286, 15 L. R. A. 847, 19 S. W. 530; Priest v. Lawrence, 16 Mo. App. 409; State v. Tully, 31 Mont. 365, 3 Ann. Cas. 824, 78 Pac. 760; Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; State v. Swink, 151 N. C. 726, 19 Ann. Cas. 422, 66 S. E. 448; State v. Keith, 63 N. C. 140; Houston etc. R. Co. v. Texas, 177 U. S. 66, 44 L. Ed. 272, 20 Sup. Ct. Rep. 545; United States v. Johnson, 26 Fed. Cas. No. 15,488, 2 Saw. 482; Jenkins v. Collard, 145 U. S. 546, 36 L. Ed. 812, 12 Sup. Ct. Rep. 868; Armstrong v. United States,

13 Wall. (U. S.) 154, 20 L. Ed. 614; In re Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Saw. 487; Coeur d'Alene Consol. etc. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Theberge v. Danjou, 12 Quebec, 1; In re Stanbro, 2 Manitoba, 1; Minnie v. Reg., 23 Can. Sup. Ct. 478.

⁵⁸ Whiton v. Albany Ins. Co., 109 Mass. 24.

⁵⁹ Dunning v. New Albany Ry. Co., 2 Ind. 437.

⁶⁰ Kirby v. Lewis, 39 Fed. 66.

⁶¹ Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 23 Sup. Ct. Rep. 692.

⁶² Caha v. United States, 152 U. S. 210, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513. (In Nagle v. United States, 145 Fed. 302, 76 C. C. A. 181, the court refused to take notice of the rules and regulations of the postoffice department.)

⁶³ Wilson v. Shaw, 204 U. S. 24, 51 L. Ed. 351, 27 Sup. Ct. Rep. 233.

⁶⁴ Larson v. First Nat Bank, 66 Neb. 595, 92 N. W. 729. Of rates established by state railroad commission: Central Georgia R. Co. v. Butler Marble etc. Co., 8 Ga. App. 1, 68 S. E. 775.

⁶⁵ State v. Candland, 36 Utah, 406, 140 Am. St. Rep. 834, 104 Pac. 285.

§ 122a (122). **Military orders.**—There is an apparent conflict as to whether judicial notice should be taken of military orders. On the one hand is a United States decision,⁶⁶ which says, "It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him." In the case in question, however, from the remarks of Mr. Justice Davis, it does not appear that the trial court was asked to take judicial notice of the military order referred to, and it must be borne in mind a court is not bound judicially to recognize that which is not brought under its notice for the purpose.⁶⁷ On the other hand, there are several authorities of good standing. For instance, judicial notice has been taken of military orders of a general nature issued by the duly authorized military commander of a district subsisting under military rule, for those orders constitute a portion of the law of such district while the military rule continues.⁶⁸ The supreme court of Louisiana will take judicial notice of historical facts in

⁶⁶ *Burke v. Miltenberger* (sometimes cited as *Burke v. Tregre*), 19 Wall. (U. S.) 519, 22 L. Ed. 158.

⁶⁷ Mr. Justice Davis said in *Burke v. Miltenberger*, *supra*: "It is contended by the plaintiff in error that an order of General Banks, in military command at New Orleans, during the period of this controversy, which is set out at length in the brief of counsel, operated as an injunction upon the proceedings of the Marshal, and that, therefore, the sale of the plantation was unauthorized. The answer to this position is that, in the state of the pleadings and evidence, we are not at liberty to pass upon the legality of this order or to determine what effect should be given to it if prop-

erly issued. It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana engaged in the decision of the case." A similar set of circumstances occur in *Johnston v. Wilson*, 29 Gratt. (Va.) 379, where the existence of the orders was not brought to the notice of the court, and when the appellate court referred to them, it was found that even if they had been before the lower court, they were not applicable to the facts.

⁶⁸ *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658; *New Orleans etc. Canal Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 335.

relation to the source whence judges of courts over which it exercises appellate jurisdiction derived their power to preside in other tribunals, at a time when the state laws were merely subsidiary to military rule. The court took judicial notice without proof of the order of General Shepley, military governor of Louisiana, made while the city of New Orleans was under the dominion and control of the federal military authorities, and requiring the judges of other courts of the parish of Orleans to hold the sessions of the fourth and fifth district courts and to terminate pending cases.⁶⁹ And in Texas, judicial notice was taken of the fact that in 1869 the government of the state of Texas was administered by military authority under the reconstruction acts of Congress, and that the orders of the commander of the fifth military district had the force and effect of law.⁷⁰ So that the apparent conflict vanishes on inquiry, and it may be taken that such military orders may call for properly invoked judicial recognition.

§ 123 (123, 133). Customs and modes of business.—Just as presumptions are founded originally on the observation of men and things, so judicial notice, founded on the propriety and necessity of the courts taking notice of “what everybody knows,” may be said primarily to include knowledge of the general and reasonable customs of the country and the ordinary and general methods of transacting business.⁷¹ Lord Holt, Chief Justice, said: “The

⁶⁹ *Lanfear v. Mestier*, *supra*; *Taylor v. Graham*, 18 La. Ann. 656, 89 Am. Dec. 699.

⁷⁰ *Gates v. Johnson*, 36 Tex. 144. See, also, *Daniel v. Hutcheson*, 86 Tex. 51, 22 S. W. 933; *Mechanics' & T. Bank v. Union Bank*, 25 La. Ann. 387, sustaining power of officer commanding military forces of government to establish provisional courts; *Betz v. Illinois C. R. Co.*, 52 La. Ann. 893, 24 South. 644, on authority of military government over civil matters.

⁷¹ *City Electric St. R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282, 31 L. R. A. 535, 34 S. W. 89; *Munn v. Birch*, 25 Ill. 35; *Sasscer v. Farmers' Bank*, 4 Md. 409; *Columbia Bank v. Fitzhugh*, 1 Har. & G. (Md.) 239; *Murphy v. Calley*, 1 Allen (Mass.), 107; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282; *Pfeiffer v. Detroit Bd. of Education*, 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250; *Rowland v. Miln*, 2 Hilt. (N. Y.) 150; *Parkersville Drainage Dist. v. Wattier*, 48

way and manner of trading is to be taken notice of.”⁷² In another English case the judge took notice of the law of the road to turn to the near hand and that it applied to riding as well as to driving.⁷³ “The law-merchant forms a branch of the law in England; and those customs, which have been universally and notoriously prevalent *amongst merchants*, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and when so adopted, it is unnecessary to plead and prove them.”⁷⁴ There are many other customs and usages of business which the courts have judicially noticed, either on the ground that they have become a part of the law or have become so notorious that proof in respect of them seems unnecessary, but this already widely extended judicial recognition necessarily cannot be expected to reach either particular or purely local customs, which are not within the general and common knowledge of mankind and must be ranked in the same category as the private habits of an individual, or some common arrangement or rule of

Or. 332, 86 Pac. 775; *Watt v. Hoch*, 25 Pa. 411; *Union Bank v. Union Ins. Co.*, *Dudley* (S. C.), 171; *State v. Metcalf*, 18 S. D. 393, 67 L. R. A. 331, 100 N. W. 923; *Bagley Elevator Co. v. Butler*, 24 S. D. 429, 123 N. W. 866; *Wray v. Knoxville etc. Co.*, 113 Tenn. 544, 82 S. W. 471; *Chadoin v. Magee*, 20 Tex. 476; *Wood v. Smith*, 23 Vt. 706; *Cady v. Case*, 11 Wash. 124, 39 Pac. 375; *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050; *Waters Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. Ed. 453, 29 Sup. Ct. Rep. 270; *United States v. Arredondo*, 6 Pet. (U. S.) 691, 8 L. Ed. 547; *Bruin v. Knott*, 9 Jur. 979, 12 Sim. 453; 59 Eng. Reprint, 1200. But the court cannot judicially

notice the dissolution of a banking firm: *In re Harrington*, 142 Wis. 447, 125 N. W. 986; nor the principles upon which a labor union is founded: *Birmingham Paint etc. Co. v. Cramp-ton* (Ala.), 39 South. 1020.

⁷² *Ford v. Hopkins*, 1 Salk. 283, 91 Eng. Reprint, Full Reprint, 250.

⁷³ *Turley v. Thomas*, 8 Car. & P. 103. Similar expressions have fallen from our own judges: *Duncan v. Littell*, 2 Bibb (Ky.), 424; *Kentucky Bank v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 431; *Wiggins Ferry Co. v. Chicago etc. R. Co.*, 5 Mo. App. 347.

⁷⁴ *Barnett v. Brandao*, 6 M. & G. 630. See notes to *Shaw v. Jacobs*, 21 L. R. A. 446, and to *Schultz v. Ford*, 12 Ann. Cas. 430.

conduct made by a few persons for their individual convenience.

§ 123a (123, 133). **Same—Illustrations.**—The subject of the courts' notice of customs and modes of business is best dealt with by illustrations of some of the many customs which have already been dealt with in judicial opinions. It would be impossible to classify so heterogeneous a mass of usages, and indeed, as to some, there is scarcely call for the chronicler, by reason of the propositions being almost self-evident. They are founded on common sense, which is invariably good law, and in the majority of cases the answer of a reasonably intelligent layman to the question, "Should the court judicially know this fact?" would be found to contain the embryo of an elaborate legal opinion on the subject. The *observance of Sundays* and certain great festivals,⁷⁵ the *law of the road*,⁷⁶ well-known methods adopted by *common carriers*, such as the system of *checking baggage*,⁷⁷ of the transfer of loaded cars from one line to another for continuous *transportation* over different lines,⁷⁸ the method of *transporting cattle*,⁷⁹ the power of superintendents⁸⁰ (but not the duties of the servants of a company), in *managing trains*,⁸¹ that *railroads are controlled* by the owners,⁸² that the *owner of logs* furnishes the cars for shipping,⁸³ modes of carrying the *mails*,⁸⁴ of building and *operating railroads*;⁸⁵ but not that the *rights*

⁷⁵ *Sascer v. Farmers' Bank*, 4 Md. 409. See note to *Merchants' etc. Bank v. Jaffray*, 19 L. R. A. 316.

⁷⁶ *Taylor, Ev.*, § 35.

⁷⁷ *Isaacson v. New York Cent. Ry. Co.*, 94 N. Y. 278, 46 Am. Rep. 142.

⁷⁸ *Burlington Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 12 L. R. A. 436, 48 N. W. 98.

⁷⁹ *Michigan Ry. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

⁸⁰ *Sacalaris v. Eureka & Palisade Ry. Co.*, 18 Nev. 155, 51 Am. Rep. 737, 1 Pac. 835.

⁸¹ *McGowan v. Railroad Co.*, 61 Mo. 528; *Highland Ry. Co. v. Walters*, 91 Ala. 435, 8 South. 357.

⁸² *South and North Ala. Ry. Co. v. Pilgreen*, 62 Ala. 305.

⁸³ *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050.

⁸⁴ *Gamble v. Central Ry. Co.*, 80 Ga. 595, 12 Am. St. Rep. 276, 7 S. E. 315.

⁸⁵ *Alabama etc. R. Co. v. Coskry*, 92 Ala. 254, 9 South. 202; *South etc. R. Co. v. Pilgreen*, 62 Ala. 305; *Highland Ave. etc. R. Co. v. Walters*, 91 Ala. 435, 8 South. 357; *Atchison etc.*

of way of railroad companies are fenced as the track is constructed,⁸⁶ of *mining* and mining terms,⁸⁷ well-known customs of *banks*, such as the ordinary powers of *cashiers*,⁸⁸ the custom to *remit by draft* instead of specie,⁸⁹ that *bankers* have a lien on deposits,⁹⁰ the mode of withdrawing *deposits*,⁹¹ the practice of *presenting* negotiable paper for payment,⁹² and of banking hours.⁹³ Courts have taken judicial notice of the nature and business of *mercantile agencies*,⁹⁴ of the nature and modes of business of *lotter-*

R. Co. v. Headland, 18 Colo. 477, 20 L. R. A. 822, 33 Pac. 185; Dye v. Virginia Midland R. Co., 20 D. C. 63; Southern R. Co. v. Hagan, 103 Ga. 564, 29 S. E. 760; Fisher v. Jansen, 30 Ill. App. 91; Pittsburg etc. R. Co. v. Callaghan, 50 Ill. App. 676, 681; Pittsburg etc. R. Co. v. Callaghan, 50 Ill. App. 676; McDonald v. Illinois Cent. R. Co., 187 Ill. 529, 58 N. E. 463; Cleveland etc. R. Co. v. Jenkins, 174 Ill. 398, 66 Am. St. Rep. 296, 62 L. R. A. 922, 51 N. E. 811; Evansville etc. R. Co. v. Smith, 65 Ind. 92; Burlington etc. R. Co. v. Dey, 82 Iowa, 312, 31 Am. St. Rep. 477, 12 L. R. A. 436, 48 N. W. 98; Lake Shore etc. R. Co. v. Miller, 25 Mich. 274; Moore v. Saginaw etc. R. Co., 115 Mich. 103, 72 N. W. 1112; Baxter v. Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114; McKibbin v. Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052; Mobile etc. R. Co. v. Stinson, 74 Miss. 453, 21 South. 14, 522; Brown v. Missouri etc. R. Co., 67 Mo. 122; Bishop v. Covenant Mut. L. Ins. Co., 85 Mo. App. 302; Jonas v. Long Island R. Co., 21 Misc. Rep. (N. Y.) 306, 47 N. Y. Supp. 149; Slater v. Jewett, 85 N. Y. 61, 29 Am. Rep. 627; Isaacson v. New York Cent. etc. R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Cleveland etc. R. Co. v. McLean, 1 Ohio C. C. 112, 1 Ohio Cir. Dec. 67; Richmond Union Pass. R. Co. v. Rich-

mond etc. R. Co., 96 Va. 670, 32 S. E. 787; Menominee River Sash etc. Co. v. Milwaukee etc. R. Co., 91 Wis. 447, 65 N. W. 176; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 884.

⁸⁶ Chicago & M. Electric R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758.

⁸⁷ Butler v. Good Enough Min. Co., 1 Alaska, 246; Fox v. Hale etc. Silver Min. Co., 108 Cal. 369, 41 Pac. 308; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

⁸⁸ Sturges v. Bank of Circleville, 11 Ohio St. 153, 78 Am. Dec. 296. See, also, La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

⁸⁹ Bowman v. First Nat. Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211.

⁹⁰ Brandao v. Barnett, 12 Clarke & F. 787, 8 Eng. Reprint, 1622.

⁹¹ Munn v. Burch, 25 Ill. 35.

⁹² Columbia Bank v. Fitzhugh, 1 Har. & G. (Md.) 239; Lewis v. Supply Co., 59 W. Va. 75, 4 L. R. A., N. S., 132, 52 S. E. 1017; Citizens' State Bank v. Cowles, 39 Misc. Rep. 571, 80 N. Y. Supp. 598; and generally on this subject see cases collected in 16 Cyc., p. 876 et seq.

⁹³ Salt Springs Nat. Bank v. Burton, 58 N. Y. 430, 17 Am. Rep. 265.

⁹⁴ Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389. See, also, Holmes v. Harrington, 20 Mo. App. 661.

ies,⁹⁵ of methods of carrying on *trade*,⁹⁶ that it is not necessary to carry on the business of a *barber on Sunday*,⁹⁷ of the powers of agents in charge of *mines*,⁹⁸ that vacant buildings are more exposed to *fire* than occupied ones;⁹⁹ that *Free Masons* form a charitable organization,¹⁰⁰ as to the character of *public institutions*, as courthouses, state banks and public prisons;¹ of the results of the *census*,² and of the customs and usages governing the creation and existence of *political parties*.³ They have also noticed the custom of merchants as to protests and notice of nonpayment of *bills of exchange*,⁴ the custom of charging *interest* on accounts after six months,⁵ that the usual method of *canceling a signature* is by drawing a line through it,⁶ and the mercantile custom of *mutual credits*, under which business establishments furnish each other's clerks or customers with goods and charge them to each other.⁷ The character of *cigarettes*⁸ is so well and so generally known, that the courts are authorized to take judicial cognizance

⁹⁵ Lohman v. State, 81 Ind. 15; Saloman v. State, 28 Ala. 83.

⁹⁶ Sacalaris v. Eureka & Palisade Ry. Co., 18 Nev. 155, 51 Am. Rep. 737, 1 Pac. 835; Western Union Tel. Co. v. Saunders, 164 Ala. 234, 51 South. 176; Kansas City v. Butt, 88 Mo. App. 237; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Wiggins Ferry Co. v. Chicago etc. R. Co., 5 Mo. App. 347 (*reversed* in 73 Mo. 389, 39 Am. Rep. 519, but containing an interesting application of the principles on which judicial notice is founded); Cameron v. Blackman, 39 Mich. 108; Citizens' State Bank v. Cowles, 39 Misc. Rep. (N. Y.) 571, 577, 80 N. Y. Supp. 598; Watt v. Hoch, 25 Pa. 411; Rice v. Montgomery, 4 Biss. 75, 20 Fed. Cas. No. 11,753.

⁹⁷ State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555.

⁹⁸ Adams Co. v. Senter, 26 Mich. 73.

⁹⁹ White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167.

¹⁰⁰ Burdine v. Grand Lodge of Alabama, 37 Ala. 478.

¹ Shaw v. State, 3 Sneed (Tenn.), 86; Buell v. Warner, 33 Vt. 570; Davis v. Bank of Fulton, 31 Ga. 69; Terry v. Merchants' Bank, 66 Ga. 177. See, also, § 124, *supra*.

² People v. Williams, 64 Cal. 87, 27 Pac. 939.

³ State v. Patterson, 18 S. D. 393, 67 L. R. A. 331, 100 N. W. 923.

⁴ Fleming v. McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671.

⁵ Watt v. Hoch, 25 Pa. 411.

⁶ Samberg v. Am. Express Co., 136 Mich. 639; 99 N. W. 879.

⁷ Cameron v. Blackman, 39 Mich. 108.

⁸ See dissenting opinion of Chief Justice Fuller and Justices Brewer, Shiras and Peckham in Austin v. Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. Rep. 132.

of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true,⁹ nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them.¹⁰ They have noticed that *pneumonia* is a disease,¹¹ the number of votes cast at an *election*,¹² that sawdust *pollutes* water,¹³ the nature of ordinary *agricultural operations*, such as the times for planting, the necessity for irrigation and its methods,¹⁴ *brokerage operations*,¹⁵ and those of *building contractors*,¹⁶ *attorneys*,¹⁷ and generally other classes of *business men*.¹⁸ Among the many other illustrations that might be given, the following will be found of interest: A court, from its knowledge of the *prices of labor* and the topography of the country, may judicially know that twenty-five dollars an acre is too much for clearing one hundred acres of land, though it might

⁹ Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. Rep. 757; 1 Greenl. Ev., § 6; 1 Whart. Ev., § 282; Lanfear v. Mestier, 18 La. Ann. 497, 89 Am. Dec. 658, and note; State v. Goyette, 11 R. I. 592; Watson v. State, 55 Ala. 158.

¹⁰ Boullemer v. State, 28 Ala. 83; 12 Am. & Eng. Ency. of Law, p. 199.

¹¹ Kiernan v. Metropolitan Ins. Co., 13 Misc. Rep. 39, 34 N. Y. Supp. 95.

¹² State v. Stearns, 72 Minn. 200, 75 N. W. 210.

¹³ State v. Mitchell, 47 W. Va. 789, 35 S. E. 845.

¹⁴ Wetzler v. Kelly, 83 Ala. 440, 3 South. 747; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Prudochl v. Randall, 108 Minn. 185, 125 N. W. 913; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 60 L. R. A. 889, 93 N. W. 781; Low v. Schaffer, 24 Or. 239, 33 Pac. 678.

¹⁵ Fox v. Hale etc. Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

¹⁶ Duby v. Jackson, 69 Minn. 342, 72 N. W. 568; Doyle v. New York, 58 App. Div. 588, 69 N. Y. Supp. 120; Conde v. Schenectady, 29 App. Div. 604, 51 N. Y. Supp. 854.

¹⁷ Stephenson v. Allinson, 123 Ala. 439, 26 South. 290.

¹⁸ Anderson v. Blood, 86 Hun (N. Y.), 244, 33 N. Y. Supp. 233; Pennsylvania Steel Co. v. Title Co., 193 N. Y. 37, 85 N. E. 820 (real estate); Von Mumm v. Wittemann, 85 Fed. 966 (wine dealers); Mathews v. Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085; Whitney v. United States, 167 U. S. 529, 42 L. Ed. 263, 17 Sup. Ct. Rep. 857 (cattle owners); Territory of New Mexico v. Denver & Rio Grande R. Co., 203 U. S. 38, 51 L. Ed. 78, 27 Sup. Ct. Rep. 1; Rowland v. Miller, 139 N. Y. 93, 22 L. R. A. 182, 34 N. E. 765 (undertakers); Fowle v. Park, 48 Fed. 789 (patent medicine venders).

not know what would be the exact cost of the work.¹⁹ So courts judicially know some *weapons* to be deadly; and an indictment under the statute for an assault with an ax need not aver that the assault was made with a deadly weapon, as the court takes judicial knowledge of the character of the weapon.²⁰ So a court will judicially know that a "*fence-pole*" is a heavy club.²¹ A court will judicially know what a *billiard-table* is, and that it is not a table at which *faro* is usually played.²² In an action to recover a tract of land, the court will not take judicial notice of a *title* in the city of San Francisco which is not pleaded or proved.²³ A court cannot know judicially the *age* of a person arraigned for a crime,²⁴ nor that a vessel found at a wharf is engaged in *navigating* the high seas or the navigable inland waters of the state, or is employed in trade, commerce, or navigation of any sort or in any manner;²⁵ nor whether the judgment of a city-hall commission was correct with respect to the suitable character of lathing.²⁶ Such cases as these, not being matters of common knowledge or general notoriety, are left to the determination of the jury from the evidence introduced.

§ 123b (123, 133). Same—Particular and local customs. From the description of the general and reasonable customs and usages recognized judicially by the courts, it will

¹⁹ Bell v. Barnet, 2 J. J. Marsh. (Ky.) 516, 531, 532.

²⁰ Dollarhide v. United States, 1 Morris (Iowa), 233, 39 Am. Dec. 460.

²¹ Baker v. Hope, 49 Cal. 598.

²² State v. Price, 12 Gill & J. 260, 37 Am. Dec. 81.

²³ Pioche v. Paul, 22 Cal. 111.

²⁴ Stephenson v. State, 28 Ind. 272.

²⁵ People v. Steamer America, 34 Cal. 679.

²⁶ Mulrein v. Kalloch, 61 Cal. 522. Among the latest cases are: As to generally known *values*: Rule v. Richards

(Tex. Civ. App.), 149 S. W. 1073; as to cost of living: McCadden v. McCadden, 116 Md. 567, 82 Atl. 554; as to *management of business*: State v. Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118; Love v. Detroit etc. R. Co., 170 Mich. 1, 135 N. W. 963; Thompson v. Gosserand (La.), 60 South. 682; Sessinghaus Milling Co. v. Hanebrink (Mo.), 152 S. W. 354; State v. Consumers Power Co. (Minn.), 137 N. W. 1104; as to time for *building railroad*: Morley etc. Co. v. Himmelberger (Mo.), 152 S. W. 86.

be properly inferred that neither unreasonable, nor particular or local customs²⁷ can be noticed other than by proof in the ordinary way. So, when a party relies on a local custom to govern his case it must be pleaded and proved.²⁸ Thus the courts have refused to notice a custom that wages should be paid in kind;²⁹ the rules of mining district;³⁰ the duties and privileges of commission merchants;³¹ a local custom of giving one-third of land for locating it;³² "head of the family" in a marriage with a Choctaw Indian;³³ a New York City custom to regulate, pave and grade streets;³⁴ the right to water appropriation under local custom;³⁵ a custom in the city of Chattanooga to discard fences between lots;³⁶ that six months is the longest period of business credit;³⁷ the customs of the Protestant Episcopal church;³⁸ the customs of mining camps;³⁹ the usages of the printers' trade;⁴⁰ or the amount of grain contained in a railroad car.⁴¹

§ 124 (124). Courts—Officers of the court—Records—Jurisdiction.—In addition to matters of common knowledge there is a large class of facts of which courts take judicial notice not merely by reason of their general notoriety, but because they are of such a character that presiding judges have particular means of knowledge with respect to them. Stated in general terms, these facts are such as relate to the organization, terms, rules of practice,

²⁷ *Columbia Bank v. Fitzhugh*, 1 Har. & G. (Md.) 239.

²⁸ *Horn v. Chicago & N. W. Ry. Co.*, 38 Wis. 463.

²⁹ *Cady v. Case*, 11 Wash. 124, 39 Pac. 375.

³⁰ *Johnson v. State*, 159 Ala. 113, 48 South. 792; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534, 6 Morr. Min. Rep. 303.

³¹ *Rapp v. Grayson*, 2 Blackf. (Ind.) 130.

³² *Longes v. Kennedy*, 2 Bibb (Ky.), 607.

³³ *Turner v. Fish*, 28 Miss. 306.

³⁴ *In re Walter*, 75 N. Y. 354.

³⁵ *Lewis v. McClure*, 8 Or. 273.

³⁶ *McCorkle v. Driskell* (Tenn.), 60 S. W. 172.

³⁷ *Wood v. Smith*, 23 Vt. 706.

³⁸ *Youngs v. Ransom*, 31 Barb. (N. Y.) 49.

³⁹ *Lewis v. McClure*, 8 Or. 273; *Meydenbauer v. Stevens*, 78 Fed. 787, 18 Morr. Min. Rep. 578.

⁴⁰ *Johnson v. Robertson*, 31 Md. 476.

⁴¹ *South & North Ala. R. R. Co. v. Wood*, 74 Ala. 449, 49 Am. Rep. 819.

records and officers of the courts themselves. To illustrate the subject more fully, judges are presumed to know the various courts of their own state and of the United States;⁴² and they will also note that tribunals are established in the several states for the adjustment of controversies and the ascertainment of rights.⁴³ They have taken notice that the province of Upper Canada is a foreign country; that it forms no part of our own; that it has a government and courts, and that these courts proceed according to the course of the common law.⁴⁴ A court must certainly be presumed to know its own officers. It must judicially know who they are, must recognize their official acts, and know their signatures,⁴⁵ though the official character be not annexed to the signature;⁴⁶ and it should know who was its clerk in a former year.⁴⁷ They also take judicial notice in their own courts of the *attorneys* and their *signatures* to admissions of service and pleadings used in the cause.⁴⁸ Where attorneys have appeared in a case and there has been no withdrawal of the appearance, the court will know judicially who have so appeared.⁴⁹ But such recognition does not extend beyond professional acts as attorneys; nor does it extend to the signature of a party to

⁴² *Tucker v. State*, 11 Md. 322; *Headman v. Rose*, 63 Ga. 458; *Hancock v. Worcester*, 62 Vt. 106, 18 Atl. 1041; *Board of Commrs. v. Shaffner*, 10 Wyo. 181, 68 Pac. 14; *Stone v. Halstead*, 62 Mo. App. 136; *State v. Fraker*, 148 Mo. 143, 49 S. W. 1017; *Commonwealth v. Desmond*, 103 Mass. 445; *Commonwealth v. Fay*, 126 Mass. 235; *Thomas v. State*, 59 Tex. Cr. 159, 127 S. W. 1030.

⁴³ *Dozier v. Joyce*, 8 Port. (Ala.) 303.

⁴⁴ *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404.

⁴⁵ *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98; *Walcott v. Gibbs*, 97 Ill. 118; *Hammann v. Mink*, 99 Ind. 279; *Alderson v. Bell*, 9 Cal. 315;

State v. Cole, 9 Humph. (Tenn.) 626; *Norvell v. McHenry*, 1 Mich. 227; *Mackinnon v. Barnes*, 66 Barb. (N. Y.) 91; *Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075; *Searls v. Knapp*, 5 S. D. 325, 49 Am. St. Rep. 873, 58 N. W. 807; *Major v. State*, 2 Sneed (Tenn.), 11. See the late cases: *Gross v. Wood*, 117 Md. 362, 83 Atl. 337; *Pullen v. City of Butte*, 45 Mont. 46, 121 Pac. 878; *Butts v. Purdy* (Or.), 125 Pac. 313.

⁴⁶ *State v. Cole*, *supra*.

⁴⁷ *Mackinnon v. Barnes*, *supra*.

⁴⁸ *Ripley v. Burgess*, 2 Hill (N. Y.), 360; *People v. Nevins*, 1 Hill (N. Y.), 154.

⁴⁹ *Symmes v. Major*, 21 Ind. 443.

the cause.⁵⁰ They will also take notice that a person who is in the grand jury room pending the investigation of a charge was a duly appointed assistant district attorney;⁵¹ and must judicially know of the supervisory power of the attorney-general over the district attorneys.⁵² By reason of this knowledge of its officers, if a writ of error has not been issued by the proper officer, the court will without motion notice the defect and dismiss the cause.⁵³ The courts of the United States will take judicial notice of the officers of the courts of the several states of the United States.⁵⁴ In like manner the courts take judicial notice of the judges of their own and of the other courts of record within the state and of the seals of such courts;⁵⁵ and that a judge of the lower court has resigned.⁵⁶ In each United States circuit and district court the seal and clerk's certificate of every other such court are so recognized.⁵⁷ The courts of every state exist by virtue of public laws by which they are created; and on familiar principles the courts must take notice of such laws and of the *jurisdiction* which they confer.⁵⁸ On the same general principle courts take notice of their own *rules* and *mode of practice*, and also of the rules

⁵⁰ *Masterson v. LeClaire*, 4 Minn. 163; *Alderson v. Bell*, 9 Cal. 315.

⁵¹ *People v. Lyman*, 2 Utah, 30.

⁵² *County of Sacramento v. Central Pacific R. R. Co.*, 61 Cal. 250.

⁵³ *Land v. Patteson, Minor (Ala.)*, 14.

⁵⁴ *Buford v. Hickman*, 1 Hempst. 232, Fed. Cas. No. 2114a.

⁵⁵ *Brunson v. State (Ala.)*, 39 South. 569; *Gilliland v. Admrs. of Sellers*, 2 Ohio St. 223.

⁵⁶ *People v. McConnell*, 155 Ill. 192, 40 N. E. 608.

⁵⁷ *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Mewster v. Spalding*, 6 McLean (U. S.), 24, Fed. Cas. No. 9513; *Wormack v. Dearman*, 7 Port. (Ala.) 513; *Matter of Keeler*, Hempst. (U. S.) 306, Fed. Cas. No. 7,637, holding that United States

courts cannot take judicial notice of justices of the peace of another state. The supreme court of Vermont took judicial notice of what judges are presiding over subordinate courts created by the constitution at a given time: *Hancock v. Town of Worcester*, 62 Vt. 106, 18 Atl. 1041. See the late cases: *Kiser v. Oglesby*, 11 Ga. App. 190, 74 S. E. 1036; *State v. Broadus*, 239 Mo. 359, 143 S. W. 455; *Hardman v. Brannon*, 70 W. Va. 726, 75 S. E. 74.

⁵⁸ *Tucker v. State*, 11 Md. 322; *Ellsworth v. Moore*, 5 Iowa, 486; *Ex parte Peterson*, 37 Ala. 74; *Kilpatrick v. Commonwealth*, 31 Pa. 198; *Webb v. Kelsey*, 66 Ark. 180, 49 S. W. 819 (justices of the peace and their jurisdiction). See note to *Olive v. State*, 4 L. R. A. 34.

and mode of practice of other courts of record within the state.⁵⁹ But an appellate court does not take such notice of the rules of practice in the inferior courts, unless such rules are prescribed by general law, or unless justice requires it in the revision of the judgments of such courts.⁶⁰ The court in which a cause is pending will take judicial notice of all *its own records* in such cause and of the proceedings in the court relating thereto.⁶¹ But in a given case the court is not held to have judicial knowledge of the pendency of *proceedings in other causes* in the same court, much less of those in other courts,⁶² for example, that there

⁵⁹ *Contee v. Pratt*, 9 Md. 67; *Newell v. Newton*, 10 Pick. (Mass.) 470.

⁶⁰ *Cherry v. Baker*, 17 Md. 75; *Scott v. Scott*, 17 Md. 78; *Cutter v. Caruthers*, 48 Cal. 178; *Kindel v. Le Bert*, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641; *March v. Commonwealth*, 12 B. Mon. (Ky.) 25. See, also, *State v. Wiethaupt*, 165 Mo. App. 634, 148 S. W. 429; *Capital City Bank v. Hilson* (Fla.), 60 South. 189.

⁶¹ *Brucker v. State*, 19 Wis. 539; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885; *State v. Bowen*, 16 Kan. 475; *Robinson v. Brown*, 82 Ill. 279. Thus an *order* or *judgment* entered in the same cause need not be proved: *Pagett v. Curtis*, 15 La. Ann. 451; but *orders* which do not properly belong to the record must be proved: *Dines v. People*, 39 Ill. App. 565; nor need it be proved that a *motion* has been made when the facts lie within the knowledge of the judge: *Secrist v. Petty*, 109 Ill. 188; nor that there has been a *former trial* or verdict: *State v. Bowen*, 16 Kan. 475. See the late cases: *Doll v. McEllen*, 21 Colo. App. 7, 121 Pac. 149; *McDougald v. Chattanooga Med. Co.*, 10 Ga. App. 653, 73 S. E. 1089; *O'Connor v. United States*, 11 Ga. App. 246, 75 S. E. 110; *Libbe v. Libbe*, 160 Mo. App. 240, 148

S. W. 460; *Franklin v. Leiter*, 149 App. Div. 678, 134 N. Y. Supp. 399; *Kiernan v. City of Portland*, 61 Or. 398, 122 Pac. 764; *McGee v. Anderson* (Tex. Civ. App.), 146 S. W. 1198; *Texas etc. R. Co. v. Powell* (Tex. Civ. App.), 147 S. W. 363; *Central Bank etc. Co. v. Davis* (Tex. Civ. App.), 149 S. W. 290; *Dowdi v. Calvi* (Ariz.), 125 Pac. 873; *Macy v. Lindley* (Ind. App.), 99 N. E. 790; *Sewell v. Price*, 164 Cal. 265, 128 Pac. 407; *Fassler v. Streit* (Neb.), 139 N. W. 628; *Silverstein v. Brown*, 138 N. Y. Supp. 848; *State v. Savage* (Tex.), 151 S. W. 530.

⁶² *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *National Bank of Monticello v. Bryant*, 13 Bush (Ky.), 419; *People v. De La Guerra*, 24 Cal. 73; *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303. In Canada it has been held that the court may avail itself of the knowledge of the judge of a previous action tried before him: *Pease v. Moosomin*, 5 Terr. L. R. 207; *Rex v. Bonnevill*, 38 N. S. R. 560. As to judicial notice of the court's own records in other actions, see notes to *Pennsylvania Co. v. McCaffrey*, 29 L. R. A. 105, and to *Murphy v. Citizens' Bank*, 12 Ann. Cas. 537. In a few cases and under special circumstances the courts have taken cognizance of

has been a former adjudication;⁶³ nor does the court take notice of the contents of the record in another action then pending.⁶⁴ The courts will not take notice that the pending case has connection with another formerly decided by the court,⁶⁵ nor that in another action there has been a conviction or an acquittal,⁶⁶ nor that another action is pending involving similar questions,⁶⁷ nor, for obvious reasons, will a state court take notice of proceedings in a federal court. No court is bound to take judicial notice of the proceedings of another court. If material to the controversy before it, it must be informed thereof by the pleadings; and, if the allegations are denied, they must be proved by the record. The state court can have no knowledge, or even notice, of the proceedings in the federal court by which its right to adjudicate on the matter in question may be affected. It should be informed in a proper way of these proceedings, before its knowledge can be assumed.⁶⁸

§ 124a (124). Same—Terms.—The courts also take judicial notice of their own fixtures for times of setting the dates of their various sessions, and their beginnings and endings; but this notice is strictly limited to their own courts, except where the terms are fixed by public laws,

other causes in their own courts: *Young Hin v. Hackfeld*, 16 Hawaii, 427.

⁶³ *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303.

⁶⁴ *Adler v. Lang*, 26 Mo. App. 226; *Enix v. Miller*, 54 Iowa, 551, 7 N. W. 93; *Baker v. Mygatt*, 14 Iowa, 131.

⁶⁵ *Banks v. Burnam*, 61 Mo. 76; *Daniel v. Bellamy*, 91 N. C. 78.

⁶⁶ *State v. Edwards*, 19 Mo. 674.

⁶⁷ *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Loomis v. Griffin* (In re Stewart), 78 Iowa, 482, 43 N. W. 296.

⁶⁸ *Haber v. Klauberg*, 3 Mo. App. 342 (citing *Johnson v. Bishop*, 8 N. B. R. 533; *Kent v. Downing*, 10 N.

B. R. 539); *Doe v. Childress*, 21 Wall. (U. S.) 643, 22 L. Ed. 549; *Eyster v. Gaff*, 1 Otto (U. S.), 521, 23 L. Ed. 403, where it is expressly decided that a court cannot take judicial notice of the proceedings in bankruptcy in another court; and it is its duty to proceed as between the parties before it until, by some proper pleadings in the case, it is informed of the changed relations of any of such parties to the subject matter of the suit. Neither the supreme court nor a district court will take judicial notice that proceedings were pending in the United States court for the final confirmation of a pueblo title, where the record does not show that fact: *Vasault v. Seitz*, 31 Cal. 225.

and then their notice of them is the ordinary judicial knowledge of the law of the state.⁶⁹ And as the *terms of court* are generally prescribed by general laws, the appellate courts take judicial notice of them,⁷⁰ as well as the day of the month and week on which a specified day of the term fell,⁷¹ and that the day on which judgment was taken was or was not a day of term,⁷² and that if a crime was committed at night, and the trial was had the next day, the court could not have been in session for a finding of an indictment.⁷³ The supreme court of Ohio refused to take notice of the duration of a *particular ses-*

⁶⁹ McMullan v. Long (Ala.), 39 South. 777; Caulfield v. Finnegan, 114 Ala. 39, 46, 21 South. 484; Rodgers v. State, 50 Ala. 102; State v. Hammett, 7 Ark. 492; Talbert v. Hopper, 42 Cal. 397; Van duzer v. Towne, 12 Colo. App. 4, 55 Pac. 13; Lanekton v. United States, 18 App. D. C. 348, 362; Edwards v. State, 123 Ga. 542, 51 S. E. 630; Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694; Moss v. Sugar Ridge Twp., 161 Ind. 417, 68 N. E. 896; Taylor v. Canady, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Anderson v. Anderson, 141 Ind. 567, 40 N. E. 131, 1082; Indiana Mut. Bldg. & L. Assn. v. Paxton, 18 Ind. App. 304, 47 N. E. 1082; Upton v. Paxton, 72 Iowa, 295, 33 N. W. 773; Dudley v. Barney, 4 Kan. App. 122, 46 Pac. 178; Kidder v. Blaisdell, 45 Me. 461; Commonwealth v. Stevens, 142 Mass. 457, 8 N. E. 344; Tromble v. Hoffman, 130 Mich. 676, 90 N. W. 694; Ledyard v. Auditor General, 121 Mich. 56, 79 N. W. 918; Roberts v. Loxley, 121 Mich. 63, 79 N. W. 978; Harwood v. Toms, 130 Mo. 225, 32 S. W. 666; Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451; Ray County Savings Bank v. Hutton, 224 Mo. 42, 123 S. W. 47; State v. Pope, 110 Mo. App. 520, 85 S. W. 633; State v. Lu Sing,

34 Mont. 31, 9 Ann. Cas. 344, 85 Pac. 521; Foster v. Frost, 15 N. C. 424; Barnwell v. Marion, 58 S. C. 459, 36 S. E. 818; Meadows v. Osterkamp, 23 S. D. 462, 122 N. W. 419; Breckenridge Cannel Coal Co. v. Scott, 121 Tenn. 88, 114 S. W. 930; Pugh v. State, 2 Head (Tenn.), 227; Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706; Davidson v. Peticolas, 34 Tex. 27; Accousi v. Stowers Furniture Co. (Tex. Civ. App.), 83 S. W. 1104; Loveless v. State (Tex. Cr.), 49 S. W. 601; Thomas v. Commonwealth, 90 Va. 92, 17 S. E. 788; State v. Maier, 36 W. Va. 757, 770, 15 S. E. 991; Board of Commrs. v. Shaffner, 10 Wyo. 181, 68 Pac. 14; Donovan v. Territory, 3 Wyo. 91, 2 Pac. 532; Ledbetter v. United States, 108 Fed. 52, 47 C. C. A. 191.

⁷⁰ Davison v. Peticolas, 34 Tex. 27; Spencer v. Curtis, 57 Ind. 221; Moss v. Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; State v. Hammett, 7 Ark. 492; Lindsay v. Williams, 17 Ala. 229; Pugh v. State, 2 Head (Tenn.), 227.

⁷¹ Lewis v. Wintrobe, 76 Ind. 13; Rodgers v. State, 50 Ala. 102; Simms v. Todd, 72 Mo. 288.

⁷² Bethune v. Hale, 45 Ala. 522.

⁷³ McGinnis v. State, 24 Ind. 500.

sion.⁷⁴ But when there is no statute or constitutional provision fixing the commencement or ending of the term of the district courts, the supreme court of Utah declined to take judicial notice of when the term, during which a judgment was taken, adjourned.⁷⁵ The ruling is the same with regard to rules of court, the knowledge of the court not extending beyond its own limits, and courts of appeal refuse to take notice of the rules of the court from which the appeal has been taken.⁷⁶ So recently, however, as 1907 the court of appeals of the District of Columbia took judicial notice of the rules of the supreme court and an adjournment of the special terms of that court.⁷⁷

§ 125 (125). Matters of history—Indians and their settlements.—Courts have always and without exception taken judicial cognizance without proof of those great historical events which have affected the destiny of our own nation or of other nations. The grounds of their notice are the common knowledge and open fame of such events. A rule is scarcely needed for guidance, but for the fact that sometimes the question arises as to whether a certain event should or should not be chronicled as historical. One historian might deem it worthy of recording, and another that it was only of local, and not of national or universal, importance. There has been an excellent judicial explanation of how far the rule is intended by the courts to go, that “Matters of public history, affecting the whole people,

⁷⁴ Gilliland v. Sellers, 2 Ohio St. 223.

⁷⁵ Felt v. Cook, 31 Utah, 299, 87 Pac. 1092.

⁷⁶ Sweeney v. Stanford, 60 Cal. 362; Kindel v. Le Bert, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641; Powell v. Springston Lumber Co., 12 Idaho, 723, 88 Pac. 97; Gudgeon v. Casey, 62 Ill. App. 599; Rout v. Ninde, 118 Ind. 123, 20 N. E. 704; McIntosh v. Commissioners of Crawford Co., 13 Kan. 171; Cornelieson v.

Foushee, 101 Ky. 257, 19 Ky. Law Rep. 417, 40 S. W. 680; State v. Arbuno, 105 La. 719, 30 South. 163; Cherry v. Baker, 17 Md. 75; Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811; Davis v. Standish, 26 Hun (N. Y.), 608; Yarnell v. Felton, 104 Fed. 161; Randall v. The New England Order of Protection, 118 Fed. 782; Van Sandau v. Turner, 6 Ad. & El., N. S., 773.

⁷⁷ Johnson-Wynne Co. v. Wright, 28 App. Cas. D. C. 375.

are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the courts, in ascertaining them, resort to such documents of reference as may be at hand, and as may be worthy of confidence."⁷⁸ No judge would deem it necessary that any history should be cited or any proof made to show that Henry V conquered France, or that his son lost it; that Charles I was beheaded; that Napoleon I established an empire and died in exile; that Julius Caesar was stabbed to death in Rome; that the Spanish Inquisition flourished from the times of Ferdinand and Isabella of Spain until the invasion by Napoleon; that Charles XII was the most famous king of Sweden; that Lincoln was President of the United States and was assassinated while holding office. These are facts of general history, upon the truth of which courts would hold and jurors would find, assuming their existence; and the rule is limited to no particular lapse of time and to no particular class of facts except that they shall be those of general history. Matters of public history concerning the state or the United States, and affecting the whole people, are judicially noticed by courts, which may rely upon such sources of information as they deem authoritative. In order to do this they will take notice of the main events which have led up to events of national importance, and in respect to such matters the court may resort to such documents or histories as may be at hand and as are deemed worthy of confidence.⁷⁹ As illustrations of the rule, courts

⁷⁸ Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560.

⁷⁹ Lewis v. Harris, 31 Ala. 689; Davies v. Hunt, 37 Ark. 574; Payne v. Treadwell, 16 Cal. 220; Ross v. Austill, 2 Cal. 183; Board of Commrs. v. May, 67 Ind. 562; State v. Gramel-spacher, 126 Ind. 398, 26 N. E. 81; Carr v. McCampbell, 61 Ind. 97; Williams v. State, 64 Ind. 553, 31 Am. Rep. 135; Banco de Sonora v. Bankers' Mut. Casualty Co. (Iowa), 95 N. W. 232; Hart v. Bodley, Hard. (Ky.)

98; Humphrey v. Burnside, 4 Bush (Ky.), 215; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Holmes v. Mallett, 1 Morris (Iowa), 111; Douthitt v. Stinson, 63 Mo. 268; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 60 L. E. A. 889, 93 N. W. 781; People v. Snyder, 41 N. Y. 397; Stokes v. Macken, 62 Barb. (N. Y.) 145; Swinnerton v. Columbian Ins. Co., *supra*; Flores v. Hovel (Tex. Civ. App.), 125 S. W. 606; Blethen v. Bonner (Tex. Civ. App.), 52 S. W.

have taken judicial notice of the existence of our Civil War, of the acts of war which led to it, and of the general social and financial results which followed it,⁸⁰ and the time of the restoration of peace by the proclamation of the President,⁸¹ that the war was terminated prior to the first day of June, 1865, and that the United States mails were re-established between Huntsville, Alabama, and New Orleans, Louisiana, prior to the 18th of December, 1865,⁸² and that the actual destruction of the institution of slavery ensued as a result of the war, before the adoption of the constitutional amendment by which it was formally abolished.⁸³ And not only the mere fact of the war and its results will be judicially noticed, but also the salient incidents and well-known features of it.⁸⁴ Thus a public event like Sherman's march to the sea, and the time when it occurred,⁸⁵ the territory surrendered to him,⁸⁶ and the position of the lines of the armies in the field at any particular period of the war,⁸⁷

571; *Magee v. Chadoin*, 30 Tex. 644, 658; *Lasher v. State*, 30 Tex. App. 387, 28 Am. St. Rep. 922, 17 S. W. 1064; *Frank v. Gump*, 104 Va. 306, 51 S. E. 358; *Simmons v. Trumbo*, 9 W. Va. 358; *United States v. Fifteen Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958; *United States v. Oregon & C. R. Co.*, 69 Fed. 899; *Lamb v. Davenport*, 1 Saw. 609, 14 Fed. Cas. No. 8015. *Gregory v. Baugh*, 4 Rand. (Va.) 611, is not in conflict. It was there sought to establish the occasional capture of Indian women and their subsequent domestication with white men. Such a fact could not possibly come within the category of great historical events. The court properly ruled that the incident of such capture was not within their cognizance. *Morris v. Edwards*, 1 Ohio, 189, also properly decided that a financial event, such as bank notes being below par in one section of the country, did not come within their cognizance. The circumstances were entirely different from *Ashley v.*

Martin, 50 Ala. 537, in which case the court took judicial notice as a part of the history of the times that in 1867 the people of Alabama were in a serious condition of insolvency. In *McKinnon v. Bliss*, 21 N. Y. 206, the court refused to take judicial notice of matters contained in a local history not offered in evidence.

⁸⁰ *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560; *Cross v. Sabin*, 13 Fed. 313; *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169, Fed. Cas. No. 3523; *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

⁸¹ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

⁸² *Turner v. Patton*, 49 Ala. 406.

⁸³ *Ferdinand v. State*, 39 Ala. 706.

⁸⁴ *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169, Fed. Cas. No. 3523.

⁸⁵ *Williams v. State*, 67 Ga. 260.

⁸⁶ *Byrne v. Attaway*, 44 Ga. 302.

⁸⁷ *Kelley v. Storey*, 6 Heisk. (Tenn.) 202.

will be judicially noticed without proof. So judicial notice will be taken of the fact that at the date of the execution of a deed, the state in which the grantor resided was in open rebellion and actual hostility to the government of the United States,⁸⁸ and of the fact that a portion of the state was under the possession and control of the government of the United States.⁸⁹ So the courts of Indiana are bound to take notice, from its general history, that during and since the war of the Rebellion, the adjutant-general of the state has made records of the muster-rolls of the different regiments of volunteers furnished by the state in the military service of the United States.⁹⁰ And a court will judicially notice that Confederate notes were issued early in the war by the Confederate government, and these notes in a short time became almost the exclusive currency of the Confederate states; that during the first year of the war these notes were but slightly depreciated, and were then received throughout the Confederate states in the payment of debts, and in all the channels of trade without doubt or question; and that they were never made a legal tender in the payment of debts by any act of the Confederate Congress;⁹¹ the existence of slavery in Louisiana;⁹² the separation of the Methodist Episcopal church of this country into a northern and southern branch in 1844;⁹³ the destruction of slavery in Alabama by act of war in September, 1865;⁹⁴ the fact that Missouri was not one of the states which joined the Confederate cause;⁹⁵ the career of General Fremont⁹⁶ in California, and that in 1869 the government of Texas was carried on by military authority

⁸⁸ Hill v. Baker, 32 Iowa, 302, 308, 7 Am. Rep. 193. See, also, Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783; Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639.

⁸⁹ Rice v. Shook, *supra*; Lewis v. Harris, 31 Ala. 689.

⁹⁰ Board etc. v. May, 67 Ind. 562.

⁹¹ Simmons v. Trumbo, 9 W. Va.

358; Keppel v. Petersburg R. R. Co., Chase (U. S.) 167, Fed. Cas. No. 7722.

⁹² Jack v. Martin, 12 Wend. (N. Y.) 311.

⁹³ Humphrey v. Burnside, 4 Bush (Ky.), 215.

⁹⁴ Ferdinand v. State, 39 Ala. 706.

⁹⁵ Douthitt v. Stinson, 63 Mo. 268.

⁹⁶ De Gilis v. United States, 13 Ct. of Cl. 117.

under the reconstruction acts.⁹⁷ Judicial notice will be taken that a certain portion of territory in the state of Texas was embraced in the territory of Austin and Williams from February, 1831, to April 29, 1834;⁹⁸ and courts also know of the existence of Martin DeLeon's colonial contract, and that Fernando DeLeon was commissioner of the colony;⁹⁹ and that Martin DeLeon was authorized to colonize within the coast border.¹⁰⁰ The courts of Louisiana have judicially noticed military orders issued by the commanding general or military governor while New Orleans was held by United States troops, which affected proceedings in courts of the state.¹ On the same principle courts have taken notice that in December, 1863, particular states were in rebellion.² The courts of New York have taken judicial notice of the history of the Six Nations as a part of the general history of that state.³ And generally of the Indian tribes and their various places of gathering—that the Osage nation was in charge of a government agent but maintained their tribal form of government,⁴ that there are four nations of them in the Indian territory,⁵ that an Indian war was raging among powerful tribes east of the Cascade mountains,⁶ and that a part of the Choctaw Nation

⁹⁷ *Gates v. Johnson County*, 36 Tex. 144.

⁹⁸ *Robertson's Admr. v. Teal's Heirs*, 9 Tex. 344.

⁹⁹ *Wheeler v. Moody*, 9 Tex. 372.

¹⁰⁰ *Kilpatrick v. Sisneros*, 23 Tex. 113.

¹ *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, and note; *Taylor v. Graham*, 18 La. Ann. 656, 89 Am. Dec. 699.

² *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193. The supreme court of the United States has refused to take notice of the orders of the military commanders in occupation of insurgent states: *Burke v. Miltenberger*, 19 Wall. (U. S.) 519, 22 L. Ed. 158. See note, 89 Am. Dec. 670, and cases cited above.

³ *Howard v. Moot*, 64 N. Y. 262; *McKinnon v. Bliss*, 21 N. Y. 206. The Illinois court has taken judicial notice of the fact that the Columbian Exposition was located in Chicago: *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045. See, also, the late cases: *Inglis v. Millersburg Dewing Assn.*, 169 Mich. 311, 136 N. W. 443; *Howell v. Sherwood*, 242 Mo. 513, 147 S. W. 810; *State v. McQuillin (Mo.)*, 152 S. W. 347; *In re Union Bank of Brooklyn*, 204 N. Y. 313, 97 N. E. 737.

⁴ *Labadie v. United States*, 6 Okl. 400, 51 Pac. 666.

⁵ *Swofford v. State*, 3 Tex. App. 76.

⁶ *Yelm Jim v. Washington Territory*, 1 Wash. Ter. 63.

is in the Western District.⁷ So, too, the courts will take judicial notice that, under the treaty of Paris between the United States and the kingdom of Spain, the Philippine Islands became a part of United States territory, and that after that time the inhabitants of those islands were in a state of insurrection against the government; and also that such insurrection had not ended in 1902 as to the Island of Mindinao.⁸ In an action to recover damages for injuries to a passenger on a street-car, resulting from stones thrown by strike sympathizers, the court will take notice of the fact that on a certain date, which was the date of the injury, the governor had ordered a military force to the town in question to preserve order, and had issued a proclamation calling upon all persons, riotously assembled, to disperse.⁹ But although the dividing line is not always easy to ascertain, the courts *will not* take judicial notice of those matters which are too uncertain in their character to have passed into general history, or which only concern individuals or local communities.¹⁰ In addition to the illustrations given in the notes, there is only to be said that the men who occupy judicial positions are nearly always able to discriminate between those great historical occasions of which a few instances have been given, which are known to be great by a great number of people, and those happenings which may be thought to be of world-wide importance by a small section of a community. An outrageous pumpkin in a village is more a matter of historical importance to the villagers than the death of Robert Louis Stevenson, of whom they had never heard, but the courts cannot be asked to take judicial notice of the pumpkin. It

⁷ Gardner v. United States, 5 Ind. Ter. 150, 82 S. W. 704.

⁸ La Rue v. Kansas Mutual Life Ins. Co., 68 Kan. 539, 75 Pac. 494.

⁹ Bosworth v. Union R. Co., 26 R. I. 309, 3 Ann. Cas. 1080, 58 Atl. 982.

¹⁰ For example, the movements of certain troops and extent of territory occupied by them in Tennessee at a

given time: McDonald v. Kirby, 3 Heisk. (Tenn.) 607; Kelley v. Story, 6 Heisk. (Tenn.) 202; Bishop v. Jones, 28 Tex. 294; also facts stated in cyclopedias or dictionaries, not matters of general knowledge: Kaolatype Engraving Co. v. Hoke, 30 Fed. 444.

is only a subject of some difficulty for the court when it would be debatable matter among well-informed men as to whether they considered a given question over the border line of minor importance; and as there cannot possibly be a standard, reliance must be placed on the common sense of the judge who would exercise his best discretion. When the party is himself in doubt, then some effort should be made to bring the matter under the notice of the court by proof if it is available.

§ 125a (125). **Same—State history.**—The history of a state, its topography and condition, enter into the construction of its statutes, and are judicially noticed by its courts.¹¹ The courts of Alabama took judicial notice of the fact, as a part of the history of the times, that the people of Alabama were in the year 1867, in a condition of very great pecuniary embarrassment and insolvency, and that in consequence of this it may not have been practicable for a guardian at that time to make a safe loan of a large sum of money without some delay after its receipt.¹² The courts of New York took judicial notice that the western portion of that state was, by its own act, ceded to Massachusetts, and by the latter conveyed to certain parties, who afterward, under the proper authority of both states and of the nation, extinguished the title of the Indians to it.¹³ So the courts of Indiana took judicial notice, as a part of the history and laws of that state, of the grant by Virginia to the United States of certain land northwest of the Ohio river, and of the statutes of Virginia concerning the primary disposal of the soil within a reservation granted to an Illinois regiment.¹⁴ So the history of a county in relation to the time and place of holding court should be judicially noticed.¹⁵ And a court may judicially notice the notoriety of a place used in describing a tract of land, as

¹¹ Williams v. State, 64 Ind. 553,
31 Am. Rep. 135.

¹² Ashley v. Martin, 50 Ala. 537.

¹³ People v. Snyder, 41 N. Y. 397.

¹⁴ Henthorn v. Doe, 1 Blackf.
(Ind.) 157.

¹⁵ Ross v. Austill, 2 Cal. 191.

when a battle connected with the history of the settlement of the state took place there one year before the description was made.¹⁶

§ 126 (126). Facts relating to the currency—Legal tender.—Inasmuch as the current coins of the United States and paper money are issued only by the government, it should be almost unnecessary to have to say that the courts take judicial cognizance of their existence;¹⁷ but the subject of this section is larger than the sole question of their existence. It involves those consequences important to the nation by reason of the value of the coin currency and the extent of its circulation and purchasing power. The court has taken judicial notice that during the Rebellion there was great financial embarrassment in the Confederate states and great difficulty in making safe investments;¹⁸ that the Confederate currency was forced into circulation, and that it became greatly depreciated,¹⁹ and that contracts were made with reference to this depreciation;²⁰ of the different classes of notes and bills and coins in circulation as money at a particular time, and of the meaning of the popular language in reference to such currency,²¹ and of the coins made at the United States mint and of foreign coins

¹⁶ Hart v. Bodley, Hard. (Ky.) 98.

¹⁷ U. S. v. Fuller, 4 N. M. 358, 20 Pac. 175; United States v. Burns, 5 McLean, 23, Fed. Cas. No. 14,691.

¹⁸ Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639; Ashley v. Martin, 50 Ala. 537; Foscue v. Lyon, 55 Ala. 440.

¹⁹ Keppel v. Petersburg Ry. Co., Chase (U. S.), 167, Fed. Cas. No. 7, 722; Simmons v. Trumbo, 9 W. Va. 358. But not of the extent of the depreciation of the currency during the Civil War: Modawell v. Holmes, 40 Ala. 391.

²⁰ Buford v. Tucker, 44 Ala. 89.

²¹ Gady v. State, 83 Ala. 51, 3 South. 429; Sands v. State, 80 Ala. 201; McDonald v. State, 2 Ga. App.

633, 58 S. E. 1067; Mallory v. State, 62 Ga. 164; Collins v. People, 39 Ill. 233; Hart v. State, 55 Ind. 599; McCarty v. State, 127 Ind. 223, 26 N. E. 665; Lampton v. Haggard, 3 T. B. Mon. (Ky.) 149; Jones v. Overstreet, 4 T. B. Mon. (Ky.) 547; State v. Moseley, 38 Mo. 380; Johnston v. Hedden, 2 Johns. Cas. 274; State v. Evans, 15 Rich. (S. C.) 31; Shaw v. State, 3 Sneed (Tenn.), 86; Jones v. State, 39 Tex. Cr. 387, 46 S. W. 250; Lumpkin v. Murrell, 46 Tex. 51; United States v. American Gold Coin, 1 Woolw. (U. S.) 217, Fed. Cas. No. 14,439; United States v. Burns, Fed. Cas. No. 14,691, 5 McLean, 23; Bryant v. Foot, L. R. 3 Q. B. 497, 9 Best & S. 444.

made current by law at different times;²² and what is legal tender.²³ And the currency of the state at a given time, and its character and condition, must be noticed by the courts thereof.²⁴ Therefore, a court will judicially notice that a United States coin of the value of ten dollars is an eagle;²⁵ that there is in the United States a lawful current coin representing the value of five cents, called a nickel, and that there is no money called a nickel other than such lawful coin of the United States which is known as a nickel;²⁶ that a fifty cent piece or a twenty-five cent piece is identical in its meaning with the half dollar, and the quarter dollar respectively;²⁷ that a quarter, as indicative of value, means twenty-five cents;²⁸ that national bank notes are a part of the currency of the United States and are legal tender;²⁹ the value of United States treasury notes as fixed by Congress;³⁰ that "as a part of the history of the time, legal-tender notes always have been and yet are" of much less value in the market than gold;³¹ that "gold coin has ceased to be used in the business of the country as money, and has become an article of merchandise and traffic";³² that national bank stock constitutes a

²² *United States v. Burns*, 5 McLean (U. S.), 23, Fed. Cas. No. 14,691; *Ector v. State*, 120 Ga. 543, 48 S. E. 315. But not of the value of the different forms of currency at a given time: *Letcher v. Kennedy*, 3 J. J. Marsh. (Ky.) 701; *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336. The value of Canadian currency and rate of interest are not judicially known by courts of the United States: *Kermott v. Ayer*, 11 Mich. 181. Nor is the current rate of exchange between cities known: *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742.

²³ *Rogers v. Rogers* (Tenn. Ch.), 35 S. W. 890; *Joiner v. State*, 124 Ga. 102, 52 S. E. 151.

²⁴ *Buford v. Tucker*, 44 Ala. 89; *Simmons v. Trumbo*, 9 W. Va. 358;

Hart v. State, 55 Ind. 599; *Belloc v. Davis*, 38 Cal. 257.

²⁵ *Daily v. State*, 10 Ind. 536.

²⁶ *Barddell v. State*, 144 Ala. 54, 39 South. 975.

²⁷ *United States v. Burns*, 5 McLean, 23, Fed. Cas. No. 14,691.

²⁸ *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029.

²⁹ *Joiner v. State*, 124 Ga. 102, 52 S. E. 151; though the direct opposite of this in *Goodman v. People*, 228 Ill. 154, 81 N. E. 830.

³⁰ *State v. Moseley*, 38 Mo. 380; *Sanchez v. State*, 39 Tex. Cr. 389, 46 S. W. 249.

³¹ *Belloc v. Davis*, 38 Cal. 257.

³² *United States v. American Gold Coins* (1868), 1 Woolw. 217, Fed. Cas. No. 14,439.

material portion of the moneyed capital of the state;³³ and what results followed from the alteration of the basis of the circulating medium to a paper standard.³⁴ So the state and condition of the Confederate currency, issued during the Civil War, will be noticed as a matter of public history.³⁵

§ 127 (127, 128). **Geographical features.**—We have already seen that the courts take judicial notice of the political subdivision of the country as it was made by law, and of the state or territory where they hold their sessions and of the judicial districts within it. Courts will take judicial notice of the *local divisions of the state* into counties, cities and towns and of the fact that certain cities are in such subdivisions.³⁶ But they are not bound to take judicial notice of the situation and distances of such divisions from each other,³⁷ nor that a certain city is in a given county, when two counties are referred to and the pleadings do not show clearly which is intended.³⁸ Courts have judicially noticed that certain named towns or cities are within the state, without proof of the fact, when it has become material for their consideration,³⁹ but they cannot know that there is another city of the same name in another state; and will presume that the city referred to in a pleading is

³³ *Wasson v. First National Bank*, 107 Ind. 206, 8 N. E. 97.

³⁴ *Morris v. Morris*, 58 Ala. 443; *Dillard v. Evans*, 4 Ark. 175; *Farwell v. Kennett*, 7 Mo. 595; *Grant v. Reese*, 94 N. C. 720; *Henly v. Franklin*, 3 Cold. (Tenn.) 472, 91 Am. Dec. 296; *Hix v. Hix*, 25 W. Va. 481; *United States v. American Gold Coin*, 1 Woolw. (U. S.) 217, Fed. Cas. No. 14,489.

³⁵ *Simmons v. Trumbo*, 9 W. Va. 358; *Keppel v. Petersburg R. R. Co.*, Chase's Dec. 167, Fed. Cas. No. 7722; and see *Modawell v. Holmes*, 40 Ala. 391.

³⁶ *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688. See § 108, *supra*.

³⁷ *Goodwin v. Appleton*, 22 Me. 453; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *Lewis v. State (Tex. Cr.)*, 24 S. W. 903.

³⁸ *Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115.

³⁹ *King v. Kent*, 29 Ala. 542; *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415; *Woodward v. Chicago etc. R. R. Co.*, 21 Wis. 309.

the one within the state.⁴⁰ They are also accustomed to take judicial notice of the leading geographical features of the country; for example, the existence and general location of important *ports, lakes, mountains, large cities*, and the course, navigability and character of great *rivers*.⁴¹ No invariable rule can be declared on the subject, nor can the cases all be harmonized, as their action depends on the notoriousness of the subject in each case. A court in New England, for example, may properly take judicial notice of some geographical fact well known within its jurisdiction, but of which a court in a western or southern state might with good reason refuse to take cognizance.⁴²

⁴⁰ Woodward v. Chicago etc. R. R. Co., *supra*.

⁴¹ As a matter of the geography and public history of the country, courts take judicial notice of the navigability of large rivers: Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Whitehurst v. Kerr, 153 N. C. 76, 68 S. E. 913 (width of Albemarle Sound); Neaderhouser v. State, 28 Ind. 257; People v. Gold Run etc. Co., 66 Cal. 146, 56 Am. Rep. 80, 4 Pac. 1152. See Whitney v. Gauche, 11 La. Ann. 432, dissenting opinion. Thus, in Neaderhouser v. State, *supra*, it is held that judicial notice will be taken of large navigable rivers like the Mississippi, Ohio, and Wabash rivers, as a part of the geography of the country, and of their navigability as a part of public history, and of the non-navigability of a river such as the Wabash above the point where its historic character ceases, that is, where it ceases to be a highway for commerce between states. And streams of less magnitude, which are in fact navigable for portions of the year, but whose capacity is not historical and traditional, will not be noticed judicially: Buffalo Pipe Line Co. v. New York etc., 10 Abb. N. C. (N. Y.) 107. In Wisconsin, however, in determin-

ing the constitutionality of a statute concerning the maintenance of dams upon navigable streams for the improvement of their navigability, the court took notice of the fact that the capacity of many small navigable streams in the state to float logs and lumber had been greatly increased by the erection of dams across them: Tewksbury v. Schulenberg, 41 Wis. 584, 593. But it is held that a court will not take judicial notice whether or not land located under scrip is in a lake, which is a navigable body of water, and therefore not subject to location: Wilcox v. Jackson, 109 Ill. 261. See extended note from which above is extracted to Lanfear v. Mestier (18 La. Ann. 497), in 89 Am. Dec. 663. They will not, however, notice minor divisions, such as farms, etc.: State v. Heft, 148 Iowa, 617, 127 N. W. 830.

⁴² Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Hincley v. Beckwith, 23 Wis. 328; Martin v. Martin, 51 Me. 366; Goodwin v. Appleton, 22 Me. 453; People v. Brooks, 101 Mich. 98, 59 N. W. 444; Tewksbury v. Schulenberg, 41 Wis. 584; Neaderhouser v. State, 27 Ind. 247; Cash v. Auditor, 7 Ind. 227; Hoyt v. Russell, 117 U. S. 401, 29 L. Ed. 914, 6

§ 127a (127, 128). Surveys—Plats—Local divisions of the state.—The *surveys* of the public lands are made pursuant to statute, and are proper subjects of judicial notice,

Sup. Ct. Rep. 881. Thus judicial notice was taken of the geographical position of the falls of the Ohio river, and of the fact that there are no other falls in Indiana for which pilots are appointed: *Cash v. Auditor*, 7 Ind. 227; so of the fact that no part of the Tallapoosa river lies within the corporate limits of the city of Montgomery, judicial notice was taken in Alabama: *City Council of Montgomery v. Montgomery Plank-road Co.*, 31 Ala. 76; and also of the fact that there are no tidal streams in Jackson county; and that Paint-rock River is *prima facie* not a public navigable stream: *Walker v. Allen*, 72 Ala. 456. So in Michigan, it was judicially noticed that part of the St. Clair river lies without the boundaries of the state: *Cummings v. Stone*, 13 Mich. 70. In Iowa, notice was taken that the island of Rock Island was within the state of Illinois, and formed a part of its territory for judicial and other purposes: *Gilbert v. Moline*, 19 Iowa, 319; and in an admiralty court, not only was the situation of a foreign town noticed with reference to a certain river, but it was also noticed that a bar had formed in the mouth of the river, over which vessels of a certain draught could not pass: *The Peterhoff, Blatchf. Prize*, 463, Fed. Cas. No. 11,024. So, also, the geographical position of Sandy Hook: *United States v. La Vengeance*, 3 Dall. (Pa.) 297, 1 L. Ed. 610; the fact that the colony of Victoria is a place beyond the seas: *Cooke v. Wilson*, 2 Jur., N. S., 1094; S. C., 1 Com. B., N. S., 153; that a place lies east or west of Greenwich, and consequently has a different time from that of Greenwich: *Curtis v. March*, 4 Jur.,

N. S., 1112; and that the state of Missouri is east of the Rocky Mountains: *Price v. Page*, 24 Mo. 65—are all matters which have been declared to be within the judicial cognizance of the court. And yet, in Missouri and Texas, it has been held that it is not proper for a court to notice judicially that the cities of New York, New Orleans, and Janesville are in other states: *Riggin v. Collier*, 6 Mo. 568, 573; *Whitlock v. Castro*, 22 Tex. 108; *Russell v. Martin*, 15 Tex. 238. This seems to be somewhat of an extreme. Courts may judicially recognize the geographical position of large and important cities without the limits of the state, and still consistently refuse to know the situation of an unimportant and not generally known town; for it is of matters of “common knowledge” of which courts are supposed to be informed. Certainly, that the geographical position of New York and New Orleans is not a matter of “common knowledge” in Missouri and Texas is much too violent a supposition to be indulged. See, also, *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737; *Volker v. State* (Ind.) 97 N. E. 422; *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041. In England, it was held that a court could not judicially know that there was no such place as Featherstone buildings, Holborn, county of Surrey: *Humphreys v. Budd*, 5 Jur. 630. (Extracted from the exhaustive note to *Lanfear v. Mestier* (18 La. Ann. 497), 89 Am. Dec. 633.) See, also, note to *Harper Furniture Co. v. Southern Express Co.*, 12 Ann. Cas. 927. Among the latest cases are *Brannan v. Henry* (Ala.), 57 South. 967; *State v. Town of Phil.*

as are the public statutes relating to such lands.⁴³ If the public surveys have established the distance from its capital to any subdivision of the state, the court will take notice of the fact, and if private property be shown to be within that subdivision, its distance from the capital will also be judicially noticed,—notice of the general act embracing all the facts included in it.⁴⁴ Judicial notice is not taken of private surveys;⁴⁵ nor will the court know without proof the quantity of land contained within given courses and distances.⁴⁶ The courts take cognizance of the *situation* of quarter sections under such surveys,⁴⁷ and of their areas,⁴⁸ and of the areas of counties within the state and the *boundary lines* of such counties,⁴⁹ of the *division* of each section into forty-acre tracts,⁵⁰ of *grants* by the United States to a state and of the *invalidity of a patent* to state lands;⁵¹ also that there can be no such description under the government survey as the “southeast side” of

Campbell (Ala.), 58 South. 905; Shields v. Pyles (Md.), 99 N. E. 742; San Joaquin etc. Co. v. Stevinson, 164 Cal. 221, 127 Pac. 924; Gibson v. Austin (Colo. App.), 128 Pac. 859.

⁴³ Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Houlton v. Chicago, St. P. M. & O. Ry. Co., 86 Wis. 59, 56 N. W. 336; Duren v. Houston & T. C. Ry. Co., 86 Tex. 287, 24 S. W. 258; Caha v. United States, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513. Of government maps: Merritt v. Barta, 158 Cal. 377, 111 Pac. 259. See, also, the late cases: Rucker v. Tennessee etc. R. Co. (Ala.), 58 South. 465; Texas Moline Plow Co. v. Clark (Tex. Civ. App.), 145 S. W. 266; Gerlach v. City of Spokane, 68 Wash. 589, 124 Pac. 121; Van Dusen Inv. Co. v. Western Fishing Co. (Or.), 124 Pac. 677; Smith v. Johnson (S. D.), 138 N. W. 18; North v. Jones (Ind. App.), 100 N. E. 84.

⁴⁴ Wright v. Phillips, 2 G. Greene (Iowa), 191; Atwater v. Schenck, 9 Wis. 160; Dickenson v. Breeden, 30 Ill. 279; Gardner v. Eberhart, 82 Ill. 316; Allegheny v. Nelson, 25 Pa. 332. See extended note on general subject to Olive v. State, 4 L. R. A. 33.

⁴⁵ Campbell v. West, 86 Cal. 197, 24 Pac. 1000.

⁴⁶ Tison v. Smith, 8 Tex. 147.

⁴⁷ Prieger v. Exchange Ins. Co., 6 Wis. 89; Dickenson v. Breeden, 30 Ill. 279.

⁴⁸ Quinn v. Windmiller, 67 Cal. 461, 8 Pac. 14.

⁴⁹ Board of Commissioners v. Spittler, 13 Ind. 235; Ham v. Ham, 39 Me. 263.

⁵⁰ Prieger v. Exchange Ins. Co., 6 Wis. 89; Atwater v. Schenck, 9 Wis. 160; Hill v. Bacon, 43 Ill. 477.

⁵¹ People v. Center, 66 Cal. 566, 5 Pac. 263, 6 Pac. 481; Houlton v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 59, 56 N. W. 336.

a quarter section;⁵² that the land described is in a given county when no other county contains a township and range answering to the description;⁵³ that the south lines of a given section and township are the same;⁵⁴ that a particular legal subdivision of a section of land in the state is not fractional;⁵⁵ and that given lands are within an Indian reservation.⁵⁶ In a few instances the courts have judicially noticed *city plats* and the location of well-known *streets* in cities of the state, as well as the directions in which they run,⁵⁷ but they do not notice judicially such things as the width of streets or sidewalks in a city.⁵⁸ Nor do the courts notice that a certain *street* in the city of New York was likely to be deserted in the evening,⁵⁹ or that a particular number of a street is in a given ward,⁶⁰ nor will courts notice judicially the point of intersection of a given street and a railroad track.⁶¹

§ 127b (127, 128). Distances—Modes of travel—Population.—Courts will take judicial notice of the geographical division of the state when necessary to determine whether the residence of a witness as stated in his deposition is more than thirty miles from the place of trial. So in determining the sufficiency of a notice to take depositions, the

⁵² *Buchanan v. Whithan*, 36 Ind. 257.

⁵³ *Bryan v. Scholl*, 109 Ind. 367, 10 N. E. 107.

⁵⁴ *Kile v. Town of Yellowhead*, 80 Ill. 208.

⁵⁵ *Peck v. Sims*, 120 Ind. 345, 22 N. E. 313.

⁵⁶ *French v. Lancaster*, 2 Dak. 346, 47 N. W. 395.

⁵⁷ *Brady v. Page*, 59 Cal. 52; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Walsh v. Railway Co.*, 102 Mo. 589, 14 S. W. 873, 15 S. W. 757; *Whittaker v. Eighth Ave. Ry. Co.*, 5 Rob. (N. Y.) 650; *Ritchie v. Catlin*, 86 Wis. 109, 56 N. W. 473. They, however, declined to do so in *Cicotte*

v. Anciaux, 53 Mich. 227, 18 N. W. 793; *Baily v. Birkhofer*, 123 Iowa, 59, 98 N. W. 594. See, also, the late cases: *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428; *State v. Consumers' Power Co.* (Minn.), 137 N. W. 1104.

⁵⁸ *Porter v. Waring*, 69 N. Y. 250; *Coe College v. City of Cedar Rapids*, 120 Iowa, 541, 95 N. W. 267. See, also, *People v. Wilkerson*, 162 Ill. App. 76.

⁵⁹ *Lenahan v. People*, 3 Hun (N. Y.), 164.

⁶⁰ *Allen v. Scharringhausen*, 8 Mo. App. 229.

⁶¹ *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

court will judicially notice the facilities of travel between the two places.⁶² In California the courts will take judicial notice of the legal distances from place to place in the state of California as established by the Political Code for the purpose of computing the time within which notice of intention to move for a new trial must be served.⁶³ The United States circuit courts will not officially take notice how long it might take an express company to carry a sum of money from one designated city to another;⁶⁴ and in a state court a judge has the right to correct statements made by counsel in addressing the jury as to geographical facts.⁶⁵ The court will also take cognizance of the *distance* between the well-known cities of the United States and of the usual rate of speed of railway trains between them,⁶⁶ of the fact that at a given time the region of Pike's Peak was within the territory of Kansas,⁶⁷ of the *facilities for travel* between points in determining whether due notice has been given for taking a deposition,⁶⁸ of the time for delivery of mail matter, and generally of those facts relating to transportation which are available for all and are commonly known,⁶⁹ of the usual duration of voyages across the Atlan-

⁶² *Manning v. Gasharie*, 27 Ind. 399, 406; *Hipes v. Cochran*, 13 Ind. 175; *Fitzpatrick v. Papa*, 89 Ind. 17; *Hinckley v. Beckwith*, 23 Wis. 328.

⁶³ *Hegard v. California Ins. Co.* (Cal.), 11 Pac. 594.

⁶⁴ *Rice v. Montgomery*, 4 Biss. 75, Fed. Cas. No. 11,753.

⁶⁵ *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737. In Maine, however, it is held that the courts are not bound to notice the distances between the different places in the same county: *Goodwin v. Appleton*, 22 Me. 453. The situation of a private claim on land or mining ground or its distance from the seat of the government is not of sufficient notoriety to demand the judicial attention of a court: *Russell v. Hoyt*, 4 Mont. 412, 2 Pac. 25. And it seems that the courts of Texas

will not take judicial notice whether or not a particular tract or grant of land lies within the twenty border leagues, the boundary line of the leagues not having been surveyed or designated: *Edwards v. Davis*, 3 Tex. 321.

⁶⁶ *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737; *Manning v. Gasharie*, 27 Ind. 399; *Fitzpatrick v. Papa*, 89 Ind. 17.

⁶⁷ *Carey v. Reeves*, 46 Kan. 571, 26 Pac. 951.

⁶⁸ *Gulf Ry. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815, 1 L. R. A. 849, 10 S. W. 81.

⁶⁹ *Hegard v. California Ins. Co.* (Cal.), 11 Pac. 594; *National Masonic Acc. Assn. v. Seed*, 95 Ill. App. 43; *Fitzpatrick v. Papa*, 89 Ind. 17; *Manning v. Gasharie*, 27 Ind. 399; *State v.*

tic,⁷⁰ of the population of cities and towns according to the authorized census reports,⁷¹ and for some purposes of distances between cities in the same⁷² or in different states.⁷³

§ 127c (127, 128). Location of railroads.—As the locality of important lines of railroad, once established, become as fixed and permanent and as well known as any other geographical feature of the country, the court must take judicial notice that two important railroads are parallel and competing lines.⁷⁴ And the court has judicial knowledge that a railroad company incorporated in one state has lines extending into another.⁷⁵ The fact that different lines of railroad run into a certain city is a matter of judicial knowledge.⁷⁶ Courts will take judicial notice of the county in which a given station or a specified railroad is located;⁷⁷

Seery, 95 Iowa, 652, 64 N. W. 631; Ferrier v. Storer, 63 Iowa, 484, 50 Am. Rep. 752, 19 N. W. 288; American Syrup & Preserving Co. v. Roberts, 112 Md. 18, 76 Atl. 589; Philadelphia B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 Atl. 193, 458; McCaskey Register Co. v. Redd, 145 Mo. App. 185, 130 S. W. 109; Bishop v. Covenant Mut. L. Ins. Co., 85 Mo. App. 302; Bouden v. Long Acre Square Bldg. Co., 92 App. Div. 325, 86 N. Y. Supp. 1080; Oppenheim v. Wolf, 3 Sand. Ch. (N. Y.) 571, (623); Harper Furnishing Co. v. Southern Express Co., 144 N. C. 639, 12 Ann. Cas. 924, 57 S. E. 458; Pierce v. Langftt, 101 Pa. 507, 47 Am. Rep. 737; Rice v. Montgomery, 7 Biss. 75, Fed. Cas. No. 11,753; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 885. Mr. Justice Harlan said in Illinois v. Pease, 207 U. S. 100, 52 L. Ed. 121, 28 Sup. Ct. Rep. 58: "We know, because everyone knows, without the testimony of witnesses, that Kenosha is only a short distance—within not more than one hour and a half's travel, by rail—from Chicago."

⁷⁰ Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157.

⁷¹ Henderson v. McGruder (Ind.), 98 N. E. 137; State v. Braskamp, 87 Iowa, 588, 54 N. W. 532; Hinckley v. Beckwith, 23 Wis. 328; State v. County Court of Jackson County, 89 Mo. 237, 1 S. W. 307; People v. Williams, 64 Cal. 87, 27 Pac. 939. In Canada, the *actual* number of residents in a town is not judicially noticed: Reg v. Atkinson, 15 Ont. Rep. 110.

⁷² Hoyt v. Russell, 117 U. S. 401, 29 L. Ed. 914, 6 Sup. Ct. Rep. 881.

⁷³ Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723, 22 L. R. A. 325, 7 C. C. A. 444.

⁷⁴ Gulf etc. R. R. Co. v. State, 72 Tex. 404, 13 Am. St. Rep. 815, 1 L. R. A. 849, 10 S. W. 81.

⁷⁵ Hobbs v. Memphis etc. R. R. Co., 9 Heisk. (Tenn.) 873.

⁷⁶ Texas etc. R. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118.

⁷⁷ Louisville etc. Ry. Co. v. McAfee, 15 Ind. App. 442, 43 N. E. 36. See, also, Freeman v. McElroy (Tex. Civ. App.), 149 S. W. 428.

or of a township through which a certain line of railroad will run;⁷⁸ and that a grade crossing on a line of railroad is a place of danger;⁷⁹ of the location and general *routes of railroads* within the state;⁸⁰ of the fact that several railroads run through a given city;⁸¹ and that the state is traversed in almost every direction by railroads.⁸²

§ 128 (129). Matters of science and art—Patents—Games and gaming.—It is the right and duty of the judge to take judicial notice of such matters of science, art, and mechanism, and things of common knowledge as are involved in cases brought before him for determination. This has been declared to be the rule in many cases, but perhaps most forcibly and clearly in the United States supreme court case hereinafter referred to.⁸³ Therefore, it is that no proof is required of those facts in science and the arts which are so generally known as to be matters of

⁷⁸ Reading v. Wedder, 66 Ill. 81.

⁷⁹ Chicago etc. R. R. Co. v. State, 47 Neb. 549, 53 Am. St. Rep. 557, 41 L. R. A. 481, 66 N. W. 624.

⁸⁰ Oppenheim v. Wolf, 3 Sand. Ch. (N. Y.) 571.

⁸¹ Texas & P. Ry. Co. v. Black, 87 Tex. 160, 27 S. W. 118.

⁸² Michigan etc. Ry. Co. v. Powers, 201 U. S. 245, 300, 50 L. Ed. 744, 26 Sup. Ct. Rep. 459.

⁸³ Brown v. Piper, 91 U. S. 37-42, 23 L. Ed. 200. The opinion of Mr. Justice Swayne was adopted in Carter Mach. Co. v. Hanes, 70 Fed. 859, where District Judge Dick said: "I am fully aware of the value of the testimony of expert witnesses in matters of science and art, and a judge may well consider and be governed by such evidence in matters of complexity, obscurity, and doubt; but there are some cases where facts are so plain, simple, obvious, and convincing to any rational mind that common sense and ordinary knowledge are all

sufficient to arrive at a just and correct opinion." Among the latest cases are: Pullman Co. v. Riley (Ala. App.), 59 South. 761; City of Chicago v. Williams, 254 Ill. 360, 98 N. E. 666; Colorado etc. Awning Co. v. Parks, 195 Fed. 275; Angelo etc. Power Co. v. Butz (Ind. App.), 98 N. E. 818; State v. Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118; City of St. Louis v. Atlantic etc. Co., 244 Mo. 479, 148 S. W. 948; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985; State v. Consumers' Power Co. (Minn.), 137 N. W. 1104; Walbridge v. Berlin Public Service Co. (Wis.), 138 N. W. 44; Chicago etc. R. Co. v. McCormick, 200 Fed. 375; Vance v. Southern Kansas Ry. (Tex. Civ. App.), 152 S. W. 743. In Kirkpatrick v. Metropolitan St. R. Co., 161 Mo. App. 515, 143 S. W. 865, the court refused to take judicial notice of the fact that there is no known mechanical contrivance in use that will prevent trolleys from becoming detached from the wires.

common knowledge.⁸⁴ Facts of this nature which are universally known, and which may be found in encyclopedias, dictionaries or other publications, will be judicially noticed, but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person.⁸⁵ Such are the use of the *telephone* and the processes employed in the art of *photography*, together with their results and the principles on which they are based.⁸⁶ Legal weights and measures are

⁸⁴ *Adler v. State*, 55 Ala. 16; *Luke v. Calhoun Co.*, 52 Ala. 115; *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A., N. S., 994; *United States Board etc. Co. v. State*, 174 Ind. 460, 91 N. E. 953; *Consumers' Gas Trust v. Littler*, 162 Ind. 320, 70 N. E. 363; *Rome R. etc. Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468; *Sun Ins. Office of London v. Western Woolen Mill Co.*, 72 Kan. 41, 82 Pac. 513; *City of Topeka v. Zufall*, 40 Kan. 47, 1 L. R. A. 387, 19 Pac. 359; *Commonwealth v. Peckham*, 2 Gray (Mass.), 514; *Warren v. City Electric Ry. Co.*, 141 Mich. 298, 104 N. W. 613; *Timson v. Coal etc. Co.*, 220 Mo. 580, 119 S. W. 565; *Frankel v. Alps Co.*, 121 Mo. App. 51, 97 S. W. 961; *Gibson v. Powell*, 96 Mo. App. 681, 70 S. W. 935; *Poor v. Watson*, 92 Mo. App. 89; *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, 26 L. R. A. 688, 28 S. W. 756; *Viemeister v. White*, 179 N. Y. 235, 103 Am. St. Rep. 859, 1 Ann. Cas. 334, 70 L. R. A. 796, 72 N. E. 97; *People v. Berghoff*, 47 Misc. Rep. 1, 95 N. Y. Supp. 257; *State v. Goyette*, 11 R. I. 592; *Ex parte Hawley*, 22 S. D. 23, 115 N. W. 93; *Houston etc. R. Co. v. Shapard*, 54 Tex. Civ. App. 596, 118 S. W. 596; *San Antonio etc. R. Co. v. Mertink* (Tex. Civ. App.), 102

S. W. 153; *Carter Mach. Co. v. Hanes*, 70 Fed. 859; *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Reprint, 749.

⁸⁵ *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444.

⁸⁶ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Luke v. Calhoun Co.*, 52 Ala. 115; *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49 (courts of justice do not ignore the great improvement in the means of communication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history); *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *Udderzook v. Commonwealth*, 76 Pa. 340, that *lithographing* is an art which requires a high degree of skill and that it is expensive work; *Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 25 Ind. App. 662, 58 N. E. 859, of the science of mensuration and mathematical propositions generally; *Seanlan v. San Francisco & S. J. & V. R. Co. (Cal.)*, 55 Pac. 694; *Price v. Connecticut Mut. L. Ins. Co.*, 48 Mo. App. 281, of scientific methods of destroying sewage matter; *Bennett v.*

therefore judicially noticed;⁸⁷ but not a rule for the measurement of corn in shuck, nor will the court declare that a railroad car twenty-six feet long, eight feet wide, and four feet high cannot hold three hundred bushels of corn in the shuck.⁸⁸ But the court has refused to notice judicially, in the absence of any showing to the contrary, that the Adams paper coil gravimetric process was not a proper test for milk;⁸⁹ and where a board of health, seeking to revoke the certificate of a medical man for gross unprofessional conduct, likely to deceive and defraud the public in advertising a certain "Electricure," introduced no evidence to

City of Marion, 119 Iowa, 473, 93 N. W. 558; Winchell v. City of Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668, of vaccination; Commonwealth v. Pear, 183 Mass. 242, 67 L. R. A. 935, 66 N. E. 719. As to the phonograph, see § 581, *post*, and Boyne City v. Anderson, 146 Mich. 328, 117 Am. St. Rep. 642, 10 Ann. Cas. 283, and note, 8 L. R. A., N. S., 306, 109 N. W. 429; of the fact that *natural gas* is an inflammable and explosive substance intrinsically dangerous: Jamieson v. Indiana Gas Co., 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76; Mississineva Co. v. Patton, 129 Ind. 472, 28 Am. St. Rep. 203, 28 N. E. 1113; of the nature and quality of tobacco: Jacob's Case, 98 N. Y. 113, 50 Am. Rep. 636; that tobacco and cigars are not drugs and medicines: Commonwealth v. Marzynski, 149 Mass. 68, 21 N. E. 228; of the deleterious effect of the use of cigarettes on health: Austin v. State, 101 Tenn. 563, 70 Am. St. Rep. 703, 50 L. R. A. 478, 48 S. W. 305; and of the variation of the magnetic needle: Bryan v. Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; that Texas or splenic fever is infectious: Dorr Cattle Co. v. Chicago etc. R. Co., 128 Iowa, 359, 103 N. W. 1003. Among the latest cases are: As to *weights and*

measures: City of New York v. Fredericks, 134 N. Y. Supp. 796; as to *cost of living*: McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554; as to *fire-escapes*: Saretsky v. Steimberg, 133 N. Y. Supp. 925; as to *cyanide process*: Richardson v. National Ore etc. Co., 34 Nev. 455, 124 Pac. 779; as to *grades of railroads*: Delavan v. New York etc. R. Co., 137 N. Y. Supp. 207; as to imperfections of *spark-arresters*: Schlag v. Chicago etc. R. Co. (Wis.), 139 N. W. 756. See, also, the late cases: United States v. Antikamnia Chemical Co., 37 App. D. C. 343; Mansur v. City of Polson, 45 Mont. 585, 125 Pac. 1002; Bachia v. Havemeyer, 77 Misc. Rep. 362, 136 N. Y. Supp. 435; Angola etc. Power Co. v. Butz (Ind. App.), 98 N. E. 818; Union Const. Co. v. Western Union Tel Co., 163 Cal. 298, 125 Pac. 242; Delaware etc. R. Co. v. Board (N. J.), 84 Atl. 702.

⁸⁷ Hockin v. Cooke, 4 Term Rep. 314, 100 Eng. Reprint, 1039; Greenl. Ev., § 5.

⁸⁸ South and North Alabama R. R. Co. v. Wood, 74 Ala. 449, 49 Am. Rep. 819.

⁸⁹ City of St. Louis v. Grafeman Dairy Co., 190 Mo. 507, 89 S. W. 627, 1 L. R. A., N. S., 926.

show that the statements of the defendant tended to the result charged and only submitted evidence as though the court were a body of medical and electro-therapeutical experts, the court disclaimed the qualification, and refused to take judicial cognizance of the alleged scientific matters, and formed its judgment solely upon the evidence adduced.⁹⁰ Perhaps this principle has its most frequent application in *patent cases*, in which the courts constantly take judicial notice of the character and the history of the art and the modes of use of well-known articles.⁹¹ For example, past methods of *rope-making*;⁹² the production of *mineral wool*;⁹³ the rendering of *wood-fiber paper* plia-

⁹⁰ *Macomber v. State Board of Health*, 28 R. I. 3, 8 L. R. A., N. S., 585, 65 Atl. 263.

⁹¹ *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U. S. 492, 497, 43 L. Ed. 1058, 19 Sup. Ct. Rep. 641; *Richards v. Elevator Co.*, 158 U. S. 299, 303, 39 L. Ed. 991, 15 Sup. Ct. Rep. 831; *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 81, 84, 39 L. Ed. 899, 15 Sup. Ct. Rep. 745; *Black Diamond Co. v. Excelsior Co.*, 156 U. S. 611, 39 L. Ed. 553, 15 Sup. Ct. Rep. 482; *Potts & Co. v. Creager*, 155 U. S. 597, 605, 39 L. Ed. 275, 15 Sup. Ct. Rep. 194; *New York Belting & Packing Co. v. New Jersey Car Spring Co.*, 137 U. S. 445, 34 L. Ed. 741, 11 Sup. Ct. Rep. 193; *Hendy v. Iron Works*, 127 U. S. 375, 32 L. Ed. 207, 8 Sup. Ct. Rep. 1275; *Phillips v. Detroit*, 111 U. S. 606, 28 L. Ed. 532, 4 Sup. Ct. Rep. 580; *King v. Gallun*, 109 U. S. 99, 27 L. Ed. 870, 3 Sup. Ct. Rep. 85; *Slawson v. Railway Co.*, 107 U. S. 649, 27 L. Ed. 576, 2 Sup. Ct. Rep. 663; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *American Sulph. P.*

Co. v. De Grasse Paper Co., 157 Fed. 660, 87 C. C. A. 260; *Baker v. Duncombe Mfg. Co.*, 146 Fed. 744, 77 C. C. A. 234; *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 119 Fed. 594; *Lamson Consolidated Service Co. v. Siegel-Cooper Co.*, 106 Fed. 734; *Parsons v. Seelye*, 100 Fed. 452, 40 C. C. A. 484; *Patent Button Co. v. Consolidated Fastener Co.*, 84 Fed. 189; *Soehner v. Favorite Stove & Range Co.*, 84 Fed. 182, 28 C. C. A. 317; *American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662; *Cleveland Faucet Co. v. Vulcan Gas Co.*, 72 Fed. 505; *Ferris v. Batcheller*, 70 Fed. 714; *Heaton Peninsula Button-Fastener Co. v. Schlochtmeier*, 69 Fed. 952; *Davock v. Chicago & N. W. R. Co.*, 69 Fed. 468; *Eclipse Mfg. Co. v. Adkins*, 36 Fed. 554; *Ligowski Clay Pigeon Co. v. Clay Bird Co.*, 34 Fed. 332; *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444.

⁹² *Safeguard Account Co. v. Wellington*, 86 Fed. 146; *Covert v. Travers Bros. Co.*, 70 Fed. 788.

⁹³ *Western Mineral Wool Insulating Fiber Co. v. Globe Mineral Wool Co.*, 75 Fed. 400.

ble;⁹⁴ *pavement* construction;⁹⁵ the fastening of *cords to gloves* and shoes;⁹⁶ the inflammable character of *coal-oil*.⁹⁷ But in an action on an insurance policy the court refused to take judicial notice that *gin and turpentine* were inflammable within the meaning of the contract.⁹⁸ That *kerosene oil* is a refined coal-oil or a refined earth oil is not a fact to be taken notice of judicially,⁹⁹ nor that fine coal-dust is explosive.¹⁰⁰ But in patent cases the courts will not take judicial notice of *facts* because they are stated in *cyclopedias* or other books,¹ nor of facts not generally known,² nor of facts the reality of which is in doubt.³ Judicial notice cannot be taken of *hypnotism*, in that the law of the United States does not recognize it.⁴ The case of *Brown v. Piper*, in the supreme court of the United States, furnishes a good illustration of the manner in which the courts may act upon their own knowledge in this class of cases. The controversy related to the novelty of a patent for preserving fish and other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber. Although the pleadings and proofs in the case were silent on the subject, the court held that the alleged invention involved no principle different from that long applied in the common ice-cream freezer, of which the court took judicial notice. Evidence of the state of an art is admissible in actions at law under the general issue without a special notice, and, in equity cases,

⁹⁴ *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662.

⁹⁵ *King v. Gallun*, 109 U. S. 99, 27 L. Ed. 870, 3 Sup. Ct. Rep. 85; *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532, 4 Sup. Ct. Rep. 580.

⁹⁶ *Ferris v. Batcheller*, 70 Fed. 714.

⁹⁷ *State v. Hayes*, 78 Mo. 307.

⁹⁸ *Mosley v. Vermont Ins. Co.*, 55 Vt. 142.

⁹⁹ *Bennett v. North British & M. Ins. Co.*, 8 Daly (N. Y.), 471. In *Morse v. Buffalo Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587, it was judicially

noticed, but the terms of the contract excluded it.

¹⁰⁰ *Cherokee Coal Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178.

¹ *Dick v. Supply Co.*, 25 Fed. 105; *Kaolatype Engrav. Co. v. Hoke*, 30 Fed. 444; *New York Belt Co. v. Rubber Co.*, 30 Fed. 785; *West v. Rae*, 33 Fed. 45.

² *Kaolatype Engrav. Co. v. Hoke*, 30 Fed. 444.

³ *Blessing v. Copper Works*, 34 Fed. 753.

⁴ *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049.

without any averment in the answer touching the subject. It consists of proof of what was old in general use at the time of the alleged invention. It is received for three purposes and none other—to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent.⁵ The courts of necessity have to take notice of such games as are prohibited by law, but in the absence of a notorious reputation to any games of chance the courts do not judicially recognize them.⁶

§ 128a (129). Statistics—Nature and qualities of common substances.—Statistics generally are so easily proven that the court should hardly be asked to take cognizance of them; and very often the fact that works of exact science are admissible in evidence has led to the conclusion that the judicial extent of knowledge should embrace

⁵ *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200. The opinion of Mr. Justice Swayne in this case has been cited over and over again in United States supreme court causes and embodies in its short length the essence of the whole subject. After dealing with the numerous subjects to which judicial cognizance might be directed the learned judge said: "The pleadings and proofs in the case under consideration are silent as to the ice-cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. The court can take judicial notice of it and give it the same effect as if it had been set up as a defense in the answer and the proof were plenary. See *Glue Co. v. Upton*, 6 Pat. Off. Gaz. 843, and *Needham v. Washburn*, 7 Pat. Off. Gaz. 651." Exhibiting the knowledge of the court of the subject then under consideration, the learned judge dealt with "freezing mixtures"

from the frozen snake fable (*Hoare v. Silverlock*, 12 Ad. & El., N. S., 624), to Good's "Corpse preserver" the patent for which was sought in 1842, and from the fact of animals belonging to extinct species being found undecomposed in the ice in Siberia and which must have been embalmed for ages (see tit. "Antiseptic," 1 Amer. Ency. 570), to Lord Bacon's untimely and unhappy efforts to preserve his poultry in snow, which process succeeded "excellently well," though making the experiments in his old age was the cause of his fatal illness.

⁶ In *re Lee Tong*, 9 Saw. (U. S.) 333, 18 Fed. 253 (fan-tan); *Ward v. State*, 22 Ala. 16 (faro bank); *State v. Burton*, 25 Tex. 420 (faro bank); *Lohman v. State*, 81 Ind. 15 (gift enterprise); *State v. Russell*, 17 Mo. App. 16 (policy); *Ex parte Bernert*, 62 Cal. 524 (pool); *Boullemet v. State*, 28 Ala. 83 (lotteries); *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029 (craps); *Shreveport v. Bowen*, 116 La. 522, 40 South. 859 (draw poker).

them.⁷ Courts will judicially notice "annuity tables" or the "American Table of Mortality," for the purpose of ascertaining the value of a wife's inchoate or contingent right of dower in her husband's lands.⁸ The courts take judicial notice of the public census and therefore of the statistics of population of cities and counties within their jurisdiction, and other matters of general concern as shown in such census returns.⁹ On the same principle the courts

⁷ Says Chalmers, J., in *Tucker v. Donald*, 60 Miss. 460, 470, 45 Am. Rep. 416: "There is a class of books which are admitted before the jury as primary evidence; but these are such as relate to sciences deemed exact, or such as by long use in the practical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who used them. To the first class belong almanacs, astronomical calculations, tables of logarithms and the like; to the second, tables of life expectations in matters of insurance." See, also, the late cases: *Noel v. Town of Lees Summit*, 166 Mo. App. 114, 148 S. W. 194; *Ruehl v. Lidgerwood etc. Co.* (N. D.), 135 N. W. 793; *White v. Southern Kansas R. Co.* (Tex. Civ. App.), 146 S. W. 692.

⁸ *Louisville & N. R. Co. v. Mother-shed*, 97 Ala. 261, 12 South. 714; *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 South. 65; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813. See, also, *Winn v. Cleveland etc. R. Co.*, 143 Ill. App. 71; *Pittsburg etc. R. Co. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467; *Valente v. Sierra R. Co.*, 151 Cal. 534, 91 Pac. 481; *Boettger v. Scherpe & Koken Architectural Iron Co.*, 136 Mo. 531, 38 S. W. 298; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Donaldson v. Mississippi R. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; and the note to *Ashworth v. Kitt-*

ridge (12 Cush. (Mass.) 193), 59 Am. Dec. 185. But in Missouri the courts will not take judicial notice of the supposed fact that during a particular season of the year what are known as Texas cattle have some contagious or infectious disease, communicable to native cattle by contact: *Bradford v. Floyd*, 80 Mo. 207. Some courts prefer the introduction of the "mortality tables" as evidence: *City of Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512; and see article "Mortality Tables," in 8 Ency. of Ev. 633.

⁹ *People v. Williams*, 64 Cal. 87, 27 Pac. 939; *Valente v. Sierra R. Co.*, 151 Cal. 534, 91 Pac. 481; *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *In re Senate Bill No. 293*, 21 Colo. 38, 39 Pac. 522; *People v. Earl*, 42 Colo. 238, 94 Pac. 294; *Chicago etc. R. Co. v. Baldrige*, 177 Ill. 229, 52 N. E. 263; *Worcester Nat. Bank v. Cheney*, 94 Ill. 430; *Whitley County v. Garty*, 161 Ind. 464, 68 N. E. 1012; *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025; *Stultz v. State*, 65 Ind. 492; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *State v. Swift*, 69 Ind. 505; *Wasson v. Indianapolis First Nat. Bank*, 107 Ind. 206, 8 N. E. 97; *Pittsburg etc. R. Co. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467; *State v. Braskamp*, 87 Iowa, 588, 54 N. W. 532; *Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844; *Ferrell v. Ellis*, 129 Iowa,

take judicial notice that certain well-known liquors like whisky, lager beer, wine, brandy, blackberry brandy, and ale, are intoxicating drinks.¹⁰ But except the liquors are

614, 105 N. W. 993; *Butler v. Stephens*, 119 Ky. 616, 84 S. W. 745; *Schwierman v. Highland Park*, 130 Ky. 537, 113 S. W. 507; *Davidson v. Schmidt* (Mo. App.), 124 S. W. 552; *Crow v. Evans*, 166 Mo. 347, 66 S. W. 355; *Timson v. Coal etc. Co.*, 220 Mo. 580, 119 S. W. 565; *State v. Mitchell* (Mo. App.), 115 S. W. 1098; *Buckert v. Richter*, 127 Mo. App. 664, 106 S. W. 1081; *Davidson v. Schmidt* (Mo. App.), 124 S. W. 552; *Short v. Morrison*, 149 Mo. App. 372, 130 S. W. 78; *Russell v. Poor* (Mo. App.), 119 S. W. 433; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Olmstead v. Red Cloud*, 86 Neb. 528, 125 N. W. 1101; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Kokes v. State*, 55 Neb. 691, 76 N. W. 467; *Denair v. Brooklyn*, 5 N. Y. Supp. 835; *Trustees of Union College v. New York*, 65 App. Div. 553, 73 N. Y. Supp. 51; *In re Board of Commissioners*, 128 App. Div. 103, 112 N. Y. Supp. 619; *Farley v. McConnell*, 7 Lans. (N. Y.) 428; *Adams v. Elwood*, 176 N. Y. 106, 68 N. E. 126; *St. Louis etc. R. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428; *Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905; *Daly v. Old*, 35 Utah, 74, 99 Pac. 460; *Page v. McClure*, 79 Vt. 83, 64 Atl. 451; *Times P. Co. v. Star Publishing Co.*, 51 Wash. 667, 16 Ann. Cas. 414, 99 Pac. 1040; *State v. Brooks*, 58 Wash. 648, 109 Pac. 211; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Welch v. Wetzel County Court*, 29 W. Va. 63, 1 S. E. 337; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

¹⁰ *State v. City Club*, 83 S. C. 509, 65 S. E. 730; *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160; *Board of Commrs. v. Taylor*, 21 N.

Y. 173; *Sothman v. State*, 66 Neb. 302, 92 N. W. 303; *Markinson v. State*, 2 Okl. Cr. 323, 101 Pac. 353; *Adler v. State*, 55 Ala. 16; *Watson v. State*, 55 Ala. 158; *Wiles v. State*, 33 Ind. 206; *Myers v. State*, 93 Ind. 251, overruling a long line of cases from *Klare v. State*, 43 Ind. 483, to *Kurz v. State*, 79 Ind. 488; *State v. Goyette*, 11 R. I. 592; *Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39; *State v. Church*, 6 S. D. 89, 60 N. W. 143. As to the meaning of malt liquor—that ale and beer are malt liquors, but not hop ale, or hop-jack: *Daniel v. State*, 149 Ala. 44, 43 South. 22; *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567 (lager beer); *The Kawaihō, 128 Fed. 879*, 63 C. C. A. 347 *okolihōa*, a well-known product of the ti root, which the supreme court of Hawaii had held “of great strength and very intoxicating”); *Fenton v. State*, 100 Ind. 598 (blackberry brandy); *Wall v. State*, 78 Ala. 417; *Freiberg v. State*, 94 Ala. 91, 10 South. 703; *Eagan v. State*, 53 Ind. 162; *Carmon v. State*, 18 Ind. 450; *Commonwealth v. Peckham*, 2 Gray (Mass.), 514; *Frese v. State*, 23 Fla. 267, 2 South. 1; *Schlicht v. State*, 56 Ind. 173; *State v. Murphy*, 23 Nev. 390, 48 Pac. 628; *Hodge v. State*, 116 Ga. 852, 43 S. E. 255; *Peterson v. State*, 63 Neb. 251, 88 N. W. 549; *Aston v. State* (Tex. Cr.), 49 S. W. 385; *Bell v. State*, 91 Ga. 227, 18 S. E. 288; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Bradley v. State*, 121 Ga. 201, 48 S. E. 981; *Feldman v. Morrison*, 1 Ill. App. 460; *Fears v. State*, 125 Ga. 740, 54 S. E. 661; *Tompkins v. State*, 2 Ga. App. 639, 58 S. E. 1111; *State v. York*, 74 N. H. 125, 13 Ann. Cas. 116, 65 Atl.

well known, such as those named, the court does not judicially notice them. Of this class are "argaric" and "rice beer," and other drinks common under prohibition laws.¹¹ Whether the Kansas statute defining intoxicating liquors as "all liquors and mixtures, by whatever name called, that will produce intoxication" embraces "McLean's Strengthening Cordial and Blood Purifier," a mixture of whisky, syrup of tulu, and syrup of wild cherry, and "Sherman's Prickly Ash Bitters," is a question of fact for the jury.¹² Whether peach cider is an intoxicating beverage is not a matter of law for the court, but is a question of fact for the jury.¹³ It has sometimes been held otherwise as to beer, but it has now been held in a New York case, overruling prior holdings to the contrary in that state, that the question as to whether beer is or is not intoxicating is a question of fact for the jury.¹⁴ A judge in Wisconsin had decided views on the subject, which he thus expressed to the jury: "I think a man must be a driveling idiot who does not know what beer is." The supreme court of the state affirmed the verdict.¹⁵ Said Mr. Justice Metcalf:

685; *Wilcoxon v. State* (Tex. Cr.), 91 S. W. 581 (whisky); *Caldwell v. State*, 43 Fla. 545, 30 South. 814 (wine); *Pedigo v. Commonwealth*, 24 Ky. Law Rep. 1029, 70 S. W. 659 (bock beer); *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (Italian sour wine, rum, gin and brandy); *Commonwealth v. Peckham*, 2 Gray (Mass.), 514; *Hoagland v. Canfield*, 160 Fed. 146 (gin); *Thomas v. Commonwealth*, 90 Va. 92, 17 S. E. 788 (apple brandy); *Blankenship v. State*, 93 Ga. 814, 21 S. E. 130 (*Busbey's Bitters*); *Rau v. People*, 63 N. Y. 277 (whisky, brandy, gin, ale and strong beer); *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350, 7 S. E. 631; *State v. Valure*, 95 Iowa, 401, 64 N. W. 280 (alcohol—"the hoary-headed mother of all intoxicants"); *United States v. Ash*, 75 Fed. 651 (whisky and whisky cocktail); *State v. Pigg*, 78 Kan. 618, 130

Am. St. Rep. 387, 19 L. R. A., N. S., 848, 97 Pac. 859 (*Manhattan cocktail*).

¹¹ *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350 (see note on intoxicating liquors), 7 S. E. 631.

¹² *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

¹³ *City of Topeka v. Zufall*, 40 Kan. 47, 1 L. R. A. 387, 19 Pac. 359; in Iowa, in *State v. Hutchinson*, 72 Iowa, 561, 34 N. W. 421, it was held that under the amended code, section 1555, cider was included in the terms "all intoxicating liquors whatever."

¹⁴ *Blatz v. Rohrbach*, 116 N. Y. 450, 6 L. R. A. 669, 22 N. E. 1049; *People v. Hunt*, 24 How. Pr. (N. Y.) 289; *Shaw v. State*, 56 Ind. 188; *Bell v. State*, 91 Ga. 227, 18 S. E. 288.

¹⁵ *Briffit v. State*, 58 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39.

"No jury can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor."¹⁶ There are so many other common substances of which the courts take judicial cognizance, that the reader must refer to the many useful encyclopedias, where they, and the cases establishing them, are enumerated. Some of them are so self-evident that judges have referred to them with a certain amount of proper impatience,¹⁷ as where the probability of light and air coming through an eight-inch brick wall had to be considered. It must suffice here to say that among the best known to the judicial cognizance are tobacco,¹⁸ explosives,¹⁹ including illuminating and artificial gas,²⁰ and inflammable liquids²¹ and electricity,²² but the court takes notice of the substance generically and not of its properties, which may be variable and not matter of common knowledge.²³

¹⁶ *Commonwealth v. Peckham*, 2 Gray (Mass.), 514. On general subject, see notes to *Snider v. State*, 12 Am. St. Rep. 353; *State v. Intoxicating Liquors*, 2 L. R. A. 408; *Lemly v. State*, 20 L. R. A. 648.

¹⁷ *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746.

¹⁸ In the *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229.

¹⁹ *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32; *Fitzsimons v. Braun*, 199 Ill. 390, 59 L. R. A. 421, 65 N. E. 249; *Buckley v. Garden City Co.*, 127 App. Div. 52, 111 N. Y. Supp. 23; *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46.

²⁰ *Jamieson v. Indiana Nat. Gas & Oil Co.*, 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76; *Alexandria Min. Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Mississinewa Min. Co. v. Pat-*

ton, 129 Ind. 472, 28 Am. St. Rep. 203, 28 N. E. 1113; *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508; *State v. Hayes*, 78 Mo. 307.

²¹ *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647; *State v. Nerzinger*, 220 Mo. 36, 119 S. W. 379; *Peterson v. Standard Oil Co.*, 55 Or. 511, Ann. Cas. 1912A, 625, 106 Pac. 337; *Texas etc. R. Co. v. Bellar*, 51 Tex. Civ. App. 323, 112 S. W. 323.

²² *Warren v. City Electric R. Co.*, 141 Mich. 298, 104 N. W. 613; *De Kallands v. Washtenaw Home Tel. Co.*, 153 Mich. 25, 15 Ann. Cas. 593, 116 N. W. 564.

²³ *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415; *People v. Hillman*, 58 App. Div. 571, 69 N. Y. Supp. 66; *Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633.

§ 129 (130). Invariable course of nature—Time—Course of seasons—Duration of life—Instincts.—It is only consonant with reason that if the courts take judicial notice of matter created by man, that they should take similar cognizance of the work of nature, and of facts which must invariably and often inevitably happen in its course.²⁴ At the same time the courts are uttering a warning that while on the one hand it is well settled that they will not stultify themselves by giving any heed to the testimony of witnesses or the inferences deducible therefrom that are so opposed to all natural law and reasonable probability as to be manifestly false,²⁵ on the other hand, courts should observe the utmost caution to avoid assuming knowledge of natural facts and laws that are beyond the scope of common positive knowledge.²⁶ Judicial notice will be taken of such facts as the lapse of time, the recurrence of the *seasons, public fasts and festivals*, the coincidence of

²⁴ *Person v. Wright*, 35 Ark. 169; *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 628, 100 Pac. 117; *Scanlan v. San Francisco & S. J. & V. R. Co. (Cal.)*, 55 Pac. 694; *Seufferle v. Macfarland*, 28 App. D. C. 94; *Rome R. & L. Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468; *Illinois C. R. Co. v. Butler*, 69 Ill. App. 128; *Sun Ins. Off. v. Mill*, 72 Kan. 41, 82 Pac. 513; *Miller v. Detroit*, 156 Mich. 630, 132 Am. St. Rep. 537, 16 Ann. Cas. 832, 121 N. W. 490; *Whitman v. Muskegon Log etc. Co.*, 152 Mich. 645, 20 L. R. A., N. S., 984, 116 N. W. 614; *Dunphy v. St. Joseph Stock Yards Co.*, 118 Mo. App. 506, 523, 95 S. W. 301; *People v. Farina*, 134 App. Div. 110, 118 N. Y. Supp. 817; *Morton v. Oregon etc. Ry. Co.*, 48 Or. 444, 120 Am. St. Rep. 827, 7 L. R. A., N. S., 344, 87 Pac. 151, 1046; *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463; *Rex v. Luffe*, 8 East, 202, 9 R. R. 406, 103 Eng. Reprint, 319.

²⁵ *Nugent v. Milling Co.*, 131 Mo. 263, 33 S. W. 428; *Hook v. Missouri etc. R. R.*, 162 Mo. 580, 63 S. W. 360.

²⁶ *Lang v. Missouri Pac. Ry. Co.*, 115 Mo. App. 489, 91 S. W. 1012. "The mysteries of nature are so manifold, deep, and subtle that the finite mind cannot indulge in dogmatic conclusions respecting them without falling into error. Human nature, being microcosmic, is not certainly known save in its most prominent outlines. Different men in their physical characteristics differ as widely as they do in outward appearance. No two individuals are alike, and, when we are called upon to apply procrustean rules, we should see to it that they fit all alike. It has been said that one man's meat is another's poison. What will kill one man will hardly injure another, and what will cause excruciating pain to one is often quite painless to another": *Dunphy v. St. Joseph Stockyards Co.*, 118 Mo. App. 506, 95 S. W. 301.

the days of the week with the days of the month and of the year,²⁷ as that a certain day fell on Sunday, and the court may so charge the jury.²⁸ So the courts take judicial notice of the difference of time between places having different longitude;²⁹ of the time when the sun and moon rise and set on a given day;³⁰ of the course of the heavenly bodies;³¹ of the meaning of the word "month," and of the order of the months;³² of the usual *course of agriculture*, and generally of the seasons and of husbandry;³³ of the harvest time in the counties where they preside;³⁴ and that in the general course of agriculture and the seasons of the year a crop will not be ready to harvest by the 10th of August.³⁵ So an agreement to extend the time of payment "to the summer" of a given year was held to mean until the first day of the first summer month, June; and an agreement to extend the time "until the fall" meant

²⁷ *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 673. In *Philadelphia Ry. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, it was held error for the court to refuse to permit counsel to use an almanac in argument to the jury to show that a witness had falsified as to date, though the almanac had not been used in evidence. See, also, *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097. See notes, *Munsbower v. State*, 39 Am. Rep. 416, and *Lanfear v. Mestier*, 89 Am. Dec. 690, on the general subject of this section.

²⁸ *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877; *Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794; *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097.

²⁹ *Curtis v. March*, 4 Jur., N. S., 1112.

³⁰ *People v. Chee Kee*, 61 Cal. 404; *Case v. Perew*, 46 Hun (N. Y.), 57; *Dayton & W. Dayton etc. Traction Co.*

v. Marshall, 36 Ind. App. 491, 75 N. E. 824.

³¹ *Tutton v. Drake*, 5 Hurl. & N. 649; *Tayl. Ev.*, § 20.

³² *Hoyle v. Lord Cornwallis*, 1 Str. 387, 93 Eng. Reprint, 584; *Harvy v. Broad*, 2 Salk. 626, 91 Eng. Reprint, 929; *Tayl. Ev.*, § 16. See, also, the recent cases: *Williams v. Allison*, 10 Ga. App. 840, 74 S. E. 442; *Kuczma v. Droszkowski*, 243 Mo. 57, 147 S. W. 1000.

³³ *Floyd v. Ricks*, 14 Ark. 286, 292, 58 Am. Dec. 374; *Ross v. Boswell*, 60 Ind. 235; *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; *Tomlinson v. Greenfield*, 31 Ark. 557; *Mahoney v. Aurrecochea*, 51 Cal. 429; *Patterson v. McCausland*, 3 Bland (Md.), 69. See, also, the late cases: *Hill v. President etc. Tualatin Academy*, 61 Or. 190, 121 Pac. 901 (habits and instincts of animals).

³⁴ *Mahoney v. Aurrecochea*, 51 Cal. 429.

³⁵ *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374.

to the first day of September.³⁶ And judicial notice will be taken of the fact that the use and occupation of a farm during six months, which include the whole of the cropping season of the year, is worth more than such use and occupation during the remainder of the year.³⁷ They will take notice of the general time for planting and harvest.³⁸ But the courts cannot take judicial notice that the weather is such that on a certain date the lakes and streams are always closed,³⁹ though the court knows that the weather is cold in certain states in February.⁴⁰ They will also take cognizance of the time of the maturity of the crops in the vicinity;⁴¹ and of the effect of dams upon streams of water.⁴² They will take judicial cognizance that a mortgage on a cotton crop made in January was upon a crop not then in being;⁴³ or if such a mortgage was made in July, that it was made upon a crop then in being.⁴⁴ And judicial notice will be taken by the courts of the time of harvest of the counties where they preside.⁴⁵ Notice will be taken of the location of the falls of the Potomac river, near Washington, D. C., where the velocity of the current of a great river is impeded by the tide, and of the variation between mean high tide and mean low tide at a certain point.⁴⁶ While judicial notice would not

³⁶ *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270.

³⁷ *Ross v. Boswell*, 60 Ind. 235.

³⁸ *Tomlinson v. Greenfield*, 31 Ark. 557; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Ross v. Boswell*, 60 Ind. 235; *Abel v. Alexander*, 45 Ind. 523, 15 Am. Dec. 270; *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747; *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47.

³⁹ *Haines v. Gibson*, 115 Mich. 131, 73 N. W. 126.

⁴⁰ *Pierce v. Railway Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302.

⁴¹ *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Ross v. Boswell*, 16 Ind. 235; *Brown v. Anderson*, 77 Cal.

236, 19 Pac. 487; *Haines v. Snedigar*, 110 Cal. 18, 42 Pac. 462.

⁴² *Tewksbury v. Schulenberg*, 41 Wis. 584. See, also, the late cases: *Cleveland etc. R. Co. v. Nichols* (Ind. App.), 99 N. E. 497; *Petajaniemi v. Washington Power Co.*, 22 Idaho, 20, 124 Pac. 783. Of the force of the wind: *Schreiner v. New York etc. Tel. Co.* (N. J.), 82 Atl. 887; *Peninsular Tel. Co. v. McCaskill* (Fla.), 60 South. 338.

⁴³ *Tomlinson v. Greenfield*, 31 Ark. 557.

⁴⁴ *Person v. Wright*, 35 Ark. 169.

⁴⁵ *Mahoney v. Aurrecochea*, 51 Cal. 429.

⁴⁶ *Seufferle v. MacFarland*, 28 App. D. C. 94.

be taken of the precise day that a given crop reaches its maturity, such notice would be taken that certain crops matured at certain seasons;⁴⁷ and judicial notice was taken of the fact that corn is mature in December.⁴⁸ Judicial notice will be taken of the fact that, in certain localities at certain seasons, there is a heavy rainfall, and that in consequence there is liability to freshets.⁴⁹ Where a promise was made in November, 1861, to pay a sum of money "after harvest," and suit was instituted upon the promise in 1864, the court would take judicial notice that the time of performance had passed, though no such averment was made in the pleadings.⁵⁰ Judicial notice will be taken of the fact that floods are followed by disease, and that swamps are detrimental to public health.⁵¹ Judicial notice was taken of the fact that a certain time after 4 and before 6 o'clock in the afternoon on September 16th was before sunset.⁵² Courts will take judicial cognizance of the laws of nature governing the effect on riparian lands of deflecting the waters of a swollen stream by the construction of a jetty;⁵³ and judicial notice will be taken that on or about January 10th, no fruit is growing on peach and apple trees.⁵⁴ But courts do not judicially know that a foggy night brings a foggy morning.⁵⁵ Judicial notice will be taken of the flora and climate generally in its jurisdiction, but not in specific parts of it.⁵⁶ They will also take

⁴⁷ *Culverhouse v. Worts*, 32 Mo. App. 419.

⁴⁸ *Garth v. Caldwell*, 72 Mo. 622.

⁴⁹ *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326, 79 N. E. 27.

⁵⁰ *Abshire v. Mather*, 27 Ind. 381.

⁵¹ *Applegate v. Franklin*, 109 Mo. App. 293, 84 S. W. 347.

⁵² *Dayton & Traction Co. v. Marshall*, 36 Ind. App. 491, 75 N. E. 824.

⁵³ *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444, 120 Am. St. Rep. 827, 7 L. R. A., N. S., 344, 87 Pac. 151, 1046.

⁵⁴ *Putman v. St. Louis Southwest-*

ern Ry. Co., 43 Tex. Civ. App. 448, 94 S. W. 1102.

⁵⁵ *Texas & N. O. R. Co. v. Langham* (Tex. Civ. App.), 95 S. W. 686.

⁵⁶ *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490; *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; *Scarbrough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383; *Townsend v. Board of Water Comms.*, 63 Ill. 26, 14 Am. Rep. 109; *Haines v. Gibson*, 115 Mich. 131, 73 N. W. 126; *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151; *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398.

notice of the *laws governing birth*, as that one is not the father of a child when nonaccess is proved until insufficient time before the birth; and generally of the laws of human gestation, which, according to Lord Coke, is fixed by the law of England at forty weeks, and the American doctrine is in harmony with this view.⁵⁷ And of life, and man—his physical and mental qualities—and the natural “ills that flesh is heir to”;⁵⁸ of the average duration and expectancy of human life, and of the Northampton and American tables of mortality,⁵⁹ of vegetable life⁶⁰ and of animals—their life, habits, and value of pedigree.⁶¹ In

⁵⁷ Tayl. Ev., § 16; Whitman v. State, 34 Ind. 360; Eddy v. Gray, 4 Allen (Mass.), 435; State v. Sexton, 10 S. D. 127, 72 N. W. 84, 11 S. D. 105, 75 N. W. 895; Erickson v. Schmill, 62 Neb. 368, 87 N. W. 166; People v. Farina, 134 App. Div. 110, 118 N. Y. Supp. 817; Heatcote's Divorce, 1 Macq. 277; Rex v. Luffe, 8 East, 202, 103 Eng. Reprint, 319.

⁵⁸ Birmingham Southern R. Co. v. Cuzzart, 133 Ala. 262, 31 South. 979; McDaniel v. State, 76 Ala. 1; Chicago Ry. Co. v. Warner, 108 Ill. 538 (no proof is necessary that the loss of an arm will interfere with ordinary business and cause pain); Floyd v. Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; State v. Hyman, 98 Md. 596, 64 L. R. A. 637, 57 Atl. 6; Scheffler v. Minneapolis etc. R. Co., 32 Minn. 518, 21 N. W. 711; Applegate v. Franklin, 109 Mo. App. 293, 84 S. W. 347 (floods followed by disease); Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; Johnson v. Hudson River Co., 6 Duer (N. Y.), 633; Hunter v. New York etc. R. Co., 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9; Kiernan v. Metropolitan L. Ins. Co., 13 Misc. Rep. (N. Y.) 39, 34 N. Y. Supp. 95; Lidwinofsky's Petition, 7 Pa. Dist. 188; Rood v. Electric Co., 55 Wash. 217, 104 Pac. 249 (sensitiveness of injured fingers); Allen v. Lyons, 1 Fed.

Cas. No. 227, 2 Wash. 475; Leovy v. United States, 177 U. S. 621, 44 L. Ed. 914, 20 Sup. Ct. Rep. 797 (reversing 92 Fed. 344, 34 C. C. A. 392).

⁵⁹ Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Northeastern Ry. Co. v. Chandler, 84 Ga. 37, 10 S. E. 586; Blair v. Madison Co., 81 Iowa, 313, 46 N. E. 1093 (the courts will also take notice of the ordinary limitations of human life); Floyd v. Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255. See, also, § 128a, *ante*, and note to Gordon v. Northern Pac. Ry. Co., 18 Ann. Cas. 586. See, also, the recent case, Leeker v. Prudential Ins. Co., 154 Mo. App. 440, 134 S. W. 676, 163 Mo. App. 523, 143 S. W. 1197; Johnson v. Hudson Ry. Co., 6 Duer (N. Y.), 633; Davis v. Standish, 26 Hun (N. Y.), 608.

⁶⁰ Scarborough v. Woodill, 7 Cal. App. 39, 93 Pac. 383; State v. Main, 69 Conn. 123, 61 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Patterson v. McCausland, 3 Bland (Md.), 69; Meyers v. Menter, 63 Neb. 427, 88 N. W. 662; Higgins v. Torvick, 55 Or. 274, 106 Pac. 22; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93; Barr v. Cardiff, 32 Tex. Civ. App. 495, 75 S. W. 341.

⁶¹ Swartzbaugh v. People, 85 Ill. 457; Davis v. Walker, 60 Ill. 453; St.

the same manner the courts should recognize the existence of ordinary *instincts* and *passions, feelings, sentiments, emotions* and *motives* which universally, in a greater or less degree, influence the actions and conduct of mankind.⁶² But the alleged laws or course of nature must be of certain and *unvarying occurrence*;⁶³ hence, the

Louis V. & T. H. R. Co. v. Hurst, 25 Ill. App. 181; Cleveland, C. C. & L. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; Wabash, St. L. & P. R. Co. v. Farver, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; Enders v. McDonald, 5 Ind. App. 297, 31 N. E. 1056; Baltimore etc. R. Co. v. Slaughter, 167 Ind. 330, 119 Am. St. Rep. 503, 7 L. R. A., N. S., 597, 79 N. E. 186; Billman v. Indianapolis etc. R. Co., 76 Ind. 166, 40 Am. Rep. 230; Dorr Cattle Co. v. Chicago & G. W. R. Co., 128 Iowa, 359, 103 N. W. 1003; Gibson v. State, 7 Ga. App. 692, 67 S. E. 838; Sun Ins. Office v. Mill, 72 Kan. 41, 82 Pac. 513; Missouri Pac. R. Co. v. Finley, 38 Kan. 550, 16 Pac. 951; State v. Asbell, 74 Kan. 397, 121 Am. St. Rep. 345, 86 Pac. 457; Gilbert v. Flint & P. M. R. Co., 51 Mich. 448, 47 Am. Rep. 592, 16 N. W. 868; Borden v. Falk Co., 97 Mo. App. 566, 71 S. W. 478; Chinn v. Chicago & A. R. Co., 100 Mo. App. 576, 75 S. W. 375; Grimes v. Eddy, 126 Mo. 168, 47 Am. St. Rep. 653, 26 L. R. A. 638, 28 S. W. 756; Bradford v. Floyd, 80 Mo. 207; Meyer v. Krauter, 56 N. J. L. 696, 24 L. R. A. 575, 29 Atl. 426; Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317, 66 Am. St. Rep. 754, 40 L. R. A. 518, 45 S. W. 790; State v. Gould, 26 W. Va. 258; Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359; Kimmish v. Ball, 129 U. S. 217, 32 L. Ed. 695, 9 Sup. Ct. Rep. 277; McLean v. Denver etc. R. Co., 203 U. S. 38, 51 L. Ed. 78, 27 Sup. Ct. Rep. 1; 1 Whart. Ev., § 336.

⁶² McDaniel v. State, 76 Ala. 1; Fonville v. State, 91 Ala. 39, 8 South. 688; People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984; Sloane v. Southern Cal. R. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; Southern R. Co. v. Covenia, 100 Ga. 46, 62 Am. St. Rep. 312, 4 L. R. A. 253, 29 S. E. 219; Wolfe v. Georgia R. Co., 2 Ga. App. 499, 58 S. E. 899; Illinois C. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; Hart v. Washington Park Club, 157 Ill. 9, 48 Am. St. Rep. 298, 29 L. R. A. 492, 41 N. E. 620; Indianapolis Journal Newsp. Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991; Spengler v. Williams, 67 Miss. 1, 6 South. 613; Buttrou v. Bridwell, 228 Mo. 622, 129 S. W. 12; Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301; Matter of Cross, 85 Hun (N. Y.), 345, 32 N. Y. Supp. 933; Rowland v. Miller, 139 N. Y. 93, 22 L. R. A. 182, 34 N. E. 765; Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 Pac. 212; Bolton v. Ovit, 80 Vt. 362, 67 Atl. 881. See, also, the recent cases: Spearman v. McCrary, 4 Ala. App. 473, 58 South. 927, 1038; State v. Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985; Knuckey v. Butte Elec. R. Co., 45 Mont. 106, 122 Pac. 280; Beach v. Bradstreet, 85 Conn. 344, Ann. Cas. 1913B, 946, 82 Atl. 1030.

⁶³ Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

extraordinary vicissitudes of climate are not so noticed; nor is the age of a tree judicially noticed from the concentric layers as shown in the trunk;⁶⁴ nor that cattle are at certain seasons liable to communicate disease;⁶⁵ nor of the age of persons from their appearance;⁶⁶ nor that a nervous condition is a characteristic of syphilis.⁶⁷

§ 129a (130). **Same — Illustrations.**—In a New York case the court of appeals applied this branch of the law of judicial notice in a somewhat novel manner. In an action by a brakeman against a railroad company for personal injury, it was claimed that the injury had been received by the plaintiff while sitting on top of a box-car while going through a tunnel; and the negligence claimed was that the company had not given him notice of a brick arch in the tunnel which reduced its height to four feet seven inches above the top of the car. No evidence was given at the trial as to the plaintiff's size or height; but the appellate court took judicial notice of the fact that the average height of men is less than six feet; that, in view of the usual proportions of the different parts of the human system, the plaintiff's head could not have struck the obstruction while he was in a sitting posture unless he was nine feet in height.⁶⁸ In an Alabama case an objection was made to evidence as to whether certain absent witnesses were white or colored.⁶⁹ Coleman, J., said that to inquire and prove that the absent witnesses were negroes was irrelevant, unless the court judicially knew the color of the witnesses affected their credibility. "If it was judicially known that as a race, the witnesses were *prima facie* unworthy of belief, the question was both relevant and legal. We cannot judicially affirm of any race of people, of what-

⁶⁴ Patterson v. McCausland, 3 Bland (Md.), 69.

⁶⁵ Bradford v. Floyd, 80 Mo. 207.

⁶⁶ Stephenson v. State, 28 Ind. 272; Hunter v. State, 18 Tex. App. 445, 51 Am. Rep. 319.

⁶⁷ St. Louis & S. F. R. Co. v. Savage, 163 Ala. 55, 50 South. 113.

⁶⁸ Hunter v. New York, O. & W. Ry. Co., 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9.

⁶⁹ Fonville v. State, 91 Ala. 39, 8 South. 688.

ever color or previous condition, as St. Paul did, that they were always liars.”⁷⁰ In an action for personal injuries,⁷¹ counsel for the defendant sought to obtain from the witness that his father and other members of the family suffered from inflamed and weak eyes, to counteract the effect of the evidence that since the injury his eyes had become weak and inflamed. In support they cited the Bible as to the sins of the fathers being visited upon the children, and that this “law of heredity, promulgated by the Almighty, is known of all men.” The court admitted cognizance of the Bible but were not prepared to admit the application in the premises cited. McClellan, C. J., said: “We do not know that inflamed or weak eyes is a sin within its terms, nor are we prepared to say that these infirmities have customarily such a descendible quality as that proof of them in the sire accounts for their existence in the son. The matter lies beyond our judicial ken. If the fact be as counsel insists it is in this connection, there should have been evidence of it. We do not judicially know it to be a fact.”

§ 130 (131). Meaning of words and phrases—Slang and slander—The Scriptures.—The meaning of English words and phrases, and of the idioms of the vernacular language, is a matter most properly within the judicial knowledge of the court, and therefore the signification of such words, phrases and idioms generally understood in the community need not be proven, even though not contained in any dictionary.⁷² The standard dictionaries may be used, and a court

⁷⁰ “One of themselves, a prophet of their own, said, Cretans are always liars, evil beasts, idle gluttons. This testimony is true”: Epistle of Paul to Titus, i: 12, 13. In a California case (*People v. Lon Yee*, 123 Cal. 246, 55 Pac. 984), Garoutte, J., in dealing with squarely conflicting evidence, said: “All the direct evidence comes from the mouths of Chinese witnesses, and, as usual in cases where

such is the fact, and where the litigation involves their interests alone, the evidence is flatly contradictory. In such a case, especially, the verdict of the jury will not be disturbed by the court.”

⁷¹ *Birmingham Southern R. Co. v. Cuzzart*, 133 Ala. 262, 31 South. 979.

⁷² *Watson v. State*, 55 Ala. 158; *Duvall v. State*, 63 Ala. 12 (greenbacks); *Adler v. State*, 55 Ala. 16

may take judicial notice that Webster's Unabridged Dictionary is a standard authority as to the meaning of English words, and may permit his definition of those words to be given in evidence to the jury.⁷³ The fluctuations and mutations of the language and meanings of words are further judicially noticed in arriving at the intentions of persons in their transactions.⁷⁴ But the judicial knowledge of the court is confined to the English language, and will

(malt liquor); *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468 (syndic); *Reed v. State*, 16 Ark. 499 (Wyandotte Indian); *Grennan v. McGregor*, 78 Cal. 258, 20 Pac. 559; *Rhodes v. Naglee*, 66 Cal. 678, 6 Pac. 863 (thief); *Baker v. Hope*, 49 Cal. 598 (fence pole); *Grennan v. McGregor*, 78 Cal. 258, 20 Pac. 559 (branch railroad); *Sinnott v. Colombet*, 107 Cal. 187, 28 L. R. A. 594, 40 Pac. 329; *Ex parte Berry*, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44 (automobile); *Knight v. Empire Land Co.*, 55 Fla. 301, 45 South. 1025 (dip); *McDonald v. State*, 2 Ga. App. 633, 58 S. E. 1067 (greenback); *Brown v. Spreckels*, 14 Haw. 399; *John II v. Judd*, 13 Haw. 319 (Hawaiian words); *Parmelee v. McNulty*, 19 Ill. 556; *People v. Pullman Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664 (supplies); *Youngs v. Youngs*, 130 Ill. 230, 17 Am. St. Rep. 313, 6 L. R. A. 548, 22 N. E. 806 (drunkards and drunkenness); *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318 (anesthetic); *Sun Ins. Office v. Mill*, 72 Kan. 41, 82 Pac. 513; *Pedigo v. Commonwealth*, 24 Ky. Law Rep. 1029, 70 S. W. 659; *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149 (Kentucky currency); *State v. Maloney*, 115 La. 498, 39 South. 539 (pool-room); *Commonwealth v. Whitney*, 11 Cush. (Mass.) 477; (drunkards and drunkenness); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206, 239 (blasphemy); *Bailey v. Kalamazoo etc.*

Co., 40 Mich. 251 (Beecher business, pettifogging shyster); *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, 256; *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389; *Boettger v. Scherpe & Koken etc. Co.*, 136 Mo. 531, 38 S. W. 298 (common laborer); *State v. Murphy*, 23 Nev. 390, 48 Pac. 628; *Power v. Bowdle*, 3 N. D. 107, 44 Am. St. Rep. 511, 21 L. R. A. 328, 54 N. W. 404; *Conde v. City of Schenectady*, 29 App. Div. 604, 51 N. Y. Supp. 854; *Martin v. Eagle Develop. Co.*, 41 Or. 448, 456, 69 Pac. 216; *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503 (league and labor); *Pauska v. Daus*, 31 Tex. 67 (colored man); *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660 (sealed—Mormon religious term); *The Mary*, 123 Fed. 608 (sack raft—not noticed); *Marvel v. Merritt*, 116 U. S. 11, 29 L. Ed. 550, 6 Sup. Ct. Rep. 207; *Eureka Vinegar Co. v. Gazette Print. Co.*, 35 Fed. 570; *Sonn v. Magone*, 159 U. S. 417, 40 L. Ed. 203, 16 Sup. Ct. Rep. 67; *Royal Baking Powder Co. v. Raymond*, 70 Fed. 376; *Saltonstall v. Wiebusch*, 156 U. S. 601, 39 L. Ed. 549, 15 Sup. Ct. Rep. 476; *United States v. Heinze*, 161 Fed. 425 (certify).

⁷³ *Adler v. State*, 55 Ala. 16; *Commonwealth v. Kneeland*, *supra*.

⁷⁴ *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 19 Am. Dec. 92; *Edgar v. McCutchen*, 9 Mo. 759; *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362.

not extend to the proper orthography or pronunciation of names in the Polish language.⁷⁵ English words the meaning of which is well understood will be judicially noticed, though they are too vulgar to be contained in any dictionary.⁷⁶ And the general and notorious, though local, signification, that is, local to the state, of a word or phrase may be judicially noticed, as, for example, the meaning of the words "squatter riot" in California.⁷⁷ In fact, in the case of phrases, and words, too, the criterion is, as it is everywhere throughout this subject of judicial notice, "common knowledge" or "general notoriety." The meaning of current phrases which everybody understands is very properly judicially noticed without proof; such as, in a slander suit, the meaning of "pettifogging shyster," or that "Beecher business," by reason of which it was said that a minister lost his situation, means adultery;⁷⁸ and the meaning of any words and idioms in the vernacular language must be judicially understood, and in such case a pleading in an action of libel or slander need contain no colloquium or innuendo to point its meaning.⁷⁹ The phrase "gift enterprise," as used in a statute prohibiting lotteries, etc., was of sufficient notoriety to be understood by the court, and was declared to mean substantially a scheme for the division or distribution of certain articles of property, to be determined by chance amongst those who had taken shares in the scheme.⁸⁰ So a Florida court has concluded

⁷⁵ *State v. Johnson*, 26 Minn. 316, 3 N. W. 982.

⁷⁶ *Edgar v. McCutchen*, 9 Mo. 759; *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362.

⁷⁷ *Clarke v. Fitch*, 41 Cal. 473.

⁷⁸ *Bailey v. Kalamazoo etc. Co.*, 40 Mich. 251. See, also, *Hoare v. Silverlock*, 12 Jur. 695; S. C., 12 Q. B. 624, 116 Eng. Reprint, 1004.

⁷⁹ *Rhodes v. Naglee*, 66 Cal. 678, 6 Pac. 863. If, however, the phrase is not a matter of common knowledge, it cannot be judicially understood, and such was the case with respect to the

term "cost-book principle," as applied in England to the method of conducting partnerships and corporations. The phrase was not sufficiently well known to enable the court to dispense with proof to its meaning: *In re Bodmin V. M. Co.*, 23 Beav. 370, 53 Eng. Reprint, 145. And the same conclusion was reached in Maryland in regard to the meaning of the words "black republican," in a statute: *Mayor etc. of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 573.

⁸⁰ *Lohman v. State*, 81 Ind. 15.

that it may judicially understand the meaning of the word "whisky" without violating the rule that its meaning must be commonly known;⁸¹ and likewise of the meaning of the words "malt liquor," as used in a penal statute, and the court may give its definition in charge to the jury.⁸² Courts will generally understand words in common use in the same sense in which they are usually understood by the masses of men, without proof. In an action for libel the court said: "There can be no doubt that where a libel or slander is couched in language having a covert meaning not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed. Courts cannot affect to be ignorant of the recent meaning which the word 'sack' has acquired in the current newspaper literature of the day, when used in the connection in which it appears in the publication complained of. As there used, it signifies a fund in hand to be used for the purposes of corruption; and to say that a person has charge of such fund to be used on a given occasion is, in effect, to say that such person is to disburse the fund for the purposes of corruption. This meaning was doubtless first given to the word by vile and corrupt persons, engaged in distributing and receiving such funds, and, when first used in that sense, might well have been regarded as a slang expression, of the meaning of which courts would not then have taken judicial notice, but it is now so frequently used to convey this particular meaning, that it can hardly be considered, when employed for that purpose, as simply the language of slang and understood by the vulgar."⁸³ And while the

⁸¹ *Frese v. State*, 23 Fla. 267, 2 South. 1.

⁸² *Adler v. State*, 55 Ala. 16.
From note to *Lanfear v. Mestier* (18

La. Ann. 497), 89 Am. Dec. 663. See, also, § 128a, *ante*.

⁸³ *Edwards v. San Jose Printing & Pub. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128.

courts will take judicial notice of the meaning of words in the English language, they will not do so where such words are ambiguous or have two distinct meanings. Thus, to charge a physician with "malpractice" in a particular case is not conclusively libelous in itself, if untrue, but is a question for the jury, because such word "has several meanings; one of them, implying illegal or immoral conduct, is libelous; and the others—bad or evil practice, practice which is not good, practice which is contrary to established rules—are not libelous."⁸⁴ A case often cited in illustration of the rule that courts will take judicial notice of well-known literary or classical allusions is that of *Hoare v. Silverlock*, in which it was held that, where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society.⁸⁵ In a Maryland case, however, the expression "black republican" was not judicially noticed.⁸⁶ Other illustrations have been given by short references following the cases in the notes. In like manner, and for stronger reasons, the courts take judicial notice of the contents of the Bible, of the numerous sects into which the religious world is divided, and also of the general doctrines maintained by each sect; for example, that there are numerous organizations called Christians respectively maintaining different and conflicting doctrines respecting predestination, eternal punishment, the infallibility of the Scriptures and the like.⁸⁷

§ 131 (132). Abbreviations.—Abbreviations and contractions, as now used, were not favored in olden time of the law, and in the important parts of formal documents are

⁸⁴ *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389.

⁸⁵ *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Hoare v. Silverlock*, 12 Adol. & El., N. S., 624, 116 Eng. Reprint, 1004.

⁸⁶ *Mayor etc. of Baltimore v. State*, *supra*.

⁸⁷ *Taylor v. Barelay*, 2 Sim. 221, 57 Eng. Reprint, 769; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 191, 20 Am. St. Rep. 41; *Hilton v. Roy-lance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660.

not even now sanctioned. The convenience, however, is so appreciable that the courts, following their usual custom with regard to judicial knowledge, have recognized those which are of common use and of common knowledge. The courts will judicially notice the recognized abbreviations and figures ordinarily employed in describing lands originally granted by United States patent;⁸⁸ the ordinary abbreviations of "Christian" names, such as "Christy" for "Christopher,"⁸⁹ "Thos." for "Thomas,"⁹⁰ "Jack" and "Jock" for "John," "Rich." for "Richard," "Bob" for "Robert,"⁹¹ that the letters "N. P." and "J. P." after a signature signify respectively notary public and justice of the peace;⁹² that the abbreviation "Adm'r," following the plaintiff's name in a complaint, is an abbreviation for the word "administrator";⁹³ the signification of the letters "C. O. D.,"⁹⁴ and that when affixed to packages sent by common carriers from seller to buyer they mean that a delivery is to be made upon payment of the charges due the seller for the price and the carrier for the carriage of the goods.⁹⁵ As the courts take notice of the vernacular language of the people and its mutations, so they will also notice whether given words, letters and figures are or are not couched in the ordinary language in use by the court and people.⁹⁶ These abbreviations are judicially understood,

⁸⁸ *Jordan v. Ditching etc. Assn. v. Wagener*, 33 Ind. 50; *Frazer v. State*, 108 Ind. 471, 7 N. E. 203; *Richardson v. Snider*, 11 Or. 197, 3 Pac. 177.

⁸⁹ *Weaver v. McElhenon*, 13 Mo. 89.

⁹⁰ *Studstill v. State*, 7 Ga. 2; *Stephen v. State*, 11 Ga. 225.

⁹¹ *Alsup v. State*, 36 Tex. Cr. 535, 38 S. W. 174.

⁹² *Towler v. Carithers*, 4 Ga. App. 517, 61 S. E. 1132; *Rowley v. Berrian*, 12 Ill. 198, 200; *Shattuck v. People*, 4 Scam. (Ill.) 478, 481.

⁹³ *Moseley v. Mastin*, 37 Ala. 216.

⁹⁴ *United States Express Co. v.*

Keefer, 59 Ind. 263; *McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

⁹⁵ *State v. Intoxicating Liquors*, 73 Me. 278.

⁹⁶ *Power v. Bowdle*, 3 N. D. 107, 44 Am. St. Rep. 511, 21 L. R. A. 328, 54 N. W. 404. In addition to the illustrations given, others are to be found in *Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 798 ("acct." for account); *Burroughs v. Wilson*, 59 Ind. 536 ("Ind." for Indiana); *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191 ("sec. 23, 38, 14," for section 23, township 38, range 14); *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360 ("supt." for superintendent);

and it is unnecessary to have formal decisions of courts to determine the facts, such as A. D. for Anno Domini, Mr. and Mrs., Dr. for Doctor, per cent, or etc. These abbreviations, and many others that might be mentioned, are so common and well known as to be virtually a part of the language. They are taught in the schools, and are understood by everyone that can read and write. Notice will be taken of the initials and abbreviations used in the description of the land in conveyances, judicial sales and assessments for taxes and other public proceedings,⁹⁷ and of the meaning of abbreviations in very general use in business affairs. There are, however, certain abbreviations peculiar to particular trades and professions, and not generally known to any but the members thereof. Thus it was very properly held that the court could not judicially know the meaning of the printer's marks, "Oct. 3, 4t," at the foot of an advertisement, and could not interpret them without evidence as to their meaning.⁹⁸ The court has refused to take judicial notice of the meaning of the letters C. B. & Q. Ry. Co.;⁹⁹ and they similarly refused judicially to know that

Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47 ("A. M." for before noon and "P. M." for afternoon); *Sheffield Furnace Co. v. Hull Coal etc. Co.*, 101 Ala. 446, 14 South. 672; *Kilmer v. Moneyweight Scale Co.*, 36 Ind. App. 568, 76 N. E. 271; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 2 Ann. Cas. 814, 67 L. R. A. 756, 100 N. W. 820 ("F. O. B." for free on board); *Alabama etc. R. Co. v. Organ Power Co.*, 92 Miss. 781, 46 South. 254 ("O. N." for order notify); *Topeka v. Stevenson*, 79 Kan. 394, 131 Am. St. Rep. 297, 17 Ann. Cas. 491, 99 Pac. 589 ("R. M. L. D." for retail malt liquor dealer); *Board of Commrs. v. Hider* (Colo.), 107 Pac. 1068 ("O. K." for all right—correct. By no means a classic or formal phrase, "O. K." may have no title to be classed as elegant English, but in the business life of

this country it has for many years been in common use, and has acquired the meaning given by the authorities cited, which is not at all obscure or uncertain); *Birmingham & A. R. Co. v. Maddox*, 155 Ala. 292, 46 South. 780 ("5x16" for five inches wide and sixteen inches long); *Griffin v. Erskine*, 131 Iowa, 444, 9 Ann. Cas. 1193, 109 N. W. 13, and cases cited therein ("Pres." for president). See note to *Topeka v. Stevenson*, 17 Ann. Cas. 492.

⁹⁷ *Kile v. Town of Yellowhead*, 80 Ill. 208; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, 21 L. R. A. 328, 54 N. W. 404; *Vivian v. State*, 16 Tex. App. 262. See note to 89 Am. Dec. 692.

⁹⁸ *Johnson v. Robertson*, 31 Md. 476.

⁹⁹ *Accolo v. Chicago B. & Q. Ry. Co.*, 70 Iowa, 185, 30 N. W. 503.

the letters N. E. K. C. stood for the name of an association;¹⁰⁰ nor is the term "guar" recognized as an abbreviation for guardian.¹ The Texas courts have been accused of refusing to understand judicially the meaning of the abbreviations "Mo." and "La.";² but they are more stringent than the courts elsewhere upon the matter of judicial notice. Thus they are also said to have refused to admit a judicial knowledge that New York and New Orleans were beyond the limits of their state, the fact not being averred, though this is not to be presumed to have been outside of the common knowledge of people of Texas.³

§ 132 (134). Facts not within the knowledge or memory of the judge—Doubtful cases.—It goes without saying that every judge upon the bench would disclaim such an encyclopedic knowledge, added to a phenomenal memory, as would serve him on every application that the court should take judicial cognizance of a given fact. However wide his reading, the suggestion of some matter for his court's knowledge and notice must frequently make a demand upon him, to which, without some means of reference or refreshing his knowledge, he might not be able to respond. It does not necessarily follow that the judge should refuse to take judicial notice of a fact when his memory is at fault in respect to the same. If there is a reasonable doubt as to whether judicial notice should be taken, it should *ex abundante cautela* be resolved in the negative.⁴ It fre-

¹⁰⁰ Van Heusen v. Argenteau, 194 N. Y. 309, 87 N. E. 437.

¹ O'Connor v. Decker, 95 Wis. 202, 70 N. W. 286.

² Ellis v. Park, 8 Tex. 205; Russell v. Martin, 15 Tex. 238; Vivian v. State, 16 Tex. App. 262.

³ Whitlock v. Castro, 22 Tex. 108; Russell v. Martin, *supra*.

⁴ Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494; People v. Board of Supervisors, 122 Ill. App. 40; Chicago St. L. & P. R.

Co. v. Champion (Ind.), 32 N. E. 874; Timson v. Manufacturers Coal etc. Co., 220 Mo. 580, 119 S. W. 565; Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301; Doyle v. City of New York, 58 App. Div. 588, 69 N. Y. Supp. 120; Miller v. Texas & N. O. R. Co., 83 Tex. 518, 18 S. W. 954; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; American Sulphite etc. Co. v. De Grasse Paper Co., 157 Fed. 660, 87 C. C. A. 260.

quently happens that it is necessary or proper for the court to refer to sources of information concerning matters which have not been referred to in the evidence, in which case it is his duty to resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most appropriate;⁵ sometimes too concerning matters of law, and in either case he may use all proper means for satisfying himself in any way that appears to him satisfactory. Sometimes he personally knows more than the court should know;⁶ but when he feels that he knows less, then he is the proper conduit through which judicial knowledge, acquired by him for the purpose, shall be conveyed, in order that the court may be given understanding of it.⁷ In a New York case the opinion

⁵ *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, 309, 47 L. Ed. 1064, 24 Sup. Ct. Rep. 860; *Caha v. United States*, 152 U. S. 211, 221, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513; *Jones v. United States*, 137 U. S. 202, 216, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *Jenkins v. Collard*, 145 U. S. 546, 560, 36 L. Ed. 812, 12 Sup. Ct. Rep. 868; *Leonard v. Lennox*, 181 Fed. 760.

⁶ See § 133, *post*.

⁷ *White v. Rankin*, 90 Ala. 541, 8 South. 118; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Cary v. State*, 76 Ala. 78; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Williams*, 64 Cal. 87, 27 Pac. 939; *Merritt v. Trinity County*, 3 Cal. App. 168, 84 Pac. 675; *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; *State v. Morris*, 47 Conn. 179; *Hall v. O'Neil Turpentine Co.*, 56 Fla. 324, 16 Ann. Cas. 738, 47 South. 609; *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688; *McMillen v. Blattner*, 67 Iowa, 287, 25 N. W. 245; *Clare v. State*, 5 Iowa, 509; *In re Howard County*, 15 Kan. 194; *State*

v. Wagner, 61 Me. 178, 186; *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Legg v. Annapolis*, 42 Md. 203; *Commonwealth v. Marzynski*, 149 Mass. 68, 21 N. E. 228; *Whiton v. Albany City Ins. Co.*, 109 Mass. 24; *State v. Stearns*, 72 Minn. 200, 219, 75 N. W. 210; *Scheffler v. Minneapolis & St. L. R. Co.*, 32 Minn. 518, 21 N. W. 711; *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389; *Puckett v. State*, 71 Miss. 192, 14 South. 452; *Gilbert v. Flint etc. R. Co.*, 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868; *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541, 24 S. W. 436; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *State v. Board of Commrs.*, 34 Mont. 426, 87 Pac. 450; *Ex parte Kair*, 28 Nev. 425, 6 Ann. Cas. 893, 82 Pac. 453; *Hall v. Brown*, 58 N. H. 93; *Attorney General v. Dublin*, 38 N. H. 459; *Cohn v. Kahn*, 14 Misc. Rep. 255, 35 N. Y. Supp. 829; *Hunter v. New York O. & W. R. Co.*, 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9; *Viemeister v. White*, 179 N. Y. 235, 103 Am. St. Rep. 859, 1 Ann. Cas. 334, 70 L. R. A. 796, 72 N. E. 97; *Rowland v. Miller*, 130 N. Y. 93, 22 L. R. A. 182, 34 N.

shows that the court had referred to various documents and to Pollard's and Greeley's histories of the Civil War.⁸ In the celebrated *Dred Scott* case, Chief Justice Taney evidently had resorted not only to judicial decisions, statutes, ordinances and works of history, but to whatever sources were available to throw light upon the social and political condition of the African race in the early history of the country.⁹ Dr. Wharton illustrates the principle:¹⁰ "The judge may consult works on collateral sciences or arts, touching the topic on trial. He may draw, for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing."¹¹ He may refer to almanacs;¹²

E. 765; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Wainwright v. Lake Shore etc. R. Co.*, 11 Ohio Cir. Dec. 530; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320, 20 Sup. Ct. Rep. 290; *Richardson County School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 101 U. S. 472, 25 L. Ed. 868; *Gardner v. Barney*, 6 Wall. (U. S.) 499, 18 L. Ed. 890; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 456, 18 Sup. Ct. Rep. 83; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *United States v. The Montello*, 11 Wall. (U. S.) 411, 20 L. Ed. 191; *United States v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590; *Foster v. Globe Ventura Syndicate*, [1900] 1 Ch. 811, 69 L. J. Ch. 375, 82 L. T. Rep., N. S., 253; *Taylor v. Barclay*, 2 Sim. 213, 57 Eng. Reprint, 769, 7 L. J. Ch., O. S., 65, 29 Rev. Rep. 82, 2 Eng. Ch. 213; *Clegg v. Levy*, 3 Campb. 166; *Neale v. Fry* (cited in *Stainer v. Droitwich*, 1 Salk. 281, 91 Eng. Reprint, 247); *Attorney General v. Drummond*, 1 C. & L. 210,

1 Dr. & Wal. 353; *Simms v. Quebec etc. R. Co.*, 22 L. C. Jur. 20; *Ex parte Dubois*, 7 Rev. Leg. 430; *Page v. Faucet, Cro. Eliz.* 227, 78 Eng. Reprint, 482; *Sedgwick, Constr. St. & Const. L.*, 2d ed., p. 26.

⁸ *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560.

⁹ *Dred Scott v. Sandford*, 19 How. (U. S.) 393, 15 L. Ed. 666. See, also, the late cases: *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041; *Boldt Co. v. Turner*, 199 Fed. 139.

¹⁰ Whart. Ev., § 282.

¹¹ *United States v. Teschmaker*, 22 How. (U. S.) 392, 16 L. Ed. 353; *Hoare v. Silverlock*, 12 Jur. 695, 12 Q. B. 624, 116 Eng. Reprint, 1004.

¹² *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674; *Louisville etc. R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 South. 892; *Mobile etc. R. Co. v. Ladd*, 92 Ala. 287, 9 South. 169; *People v. Chee Kee*, 61 Cal. 404; *State v. Morris*, 47 Conn. 179; *Stewart v. Rosengren*, 66 Neb. 445, 92 N. W. 586; *Montenes v. Metropolitan St. R. Co.*, 77 App. Div. 493, 78 N. Y. Supp. 1059; *Cohn v. Kahn*, 14 Misc. 255, 35 N. Y. Supp. 829; *Page v. Faucet, Cro. Eliz.* 227, 78 Eng. Reprint, 482; *Tutton v. Darke*, 5 Hurl. & N. 649.

he may appeal to his own memory for the meaning of a word in the vernacular;¹³ he may, as to the meaning of terms, refer to dictionaries of science of all classes;¹⁴ he may determine the meaning of the abbreviations of Christian names and offices, and of other common terms;¹⁵ as to a point of political history (e. g., the recognition of a foreign government); he may consult the executive department of the state;¹⁶ he may cause inquiry to be made as to the practice of other courts;¹⁷ and Lord Hardwicke went so far as to inquire of an eminent conveyancer as to a rule of conveyancing practice.¹⁸ And so the court may have recourse to the legislative rolls to determine the construction of a statute.¹⁹

¹³ *Rex v. Woodward*, 1 Moo. C. C. 323; *Clementi v. Golding*, 2 Camp. 25; *Moufflet v. Cole*, L. R. 7 Ex. 70. As to local idioms, see *In re Bodminn Mines Co.*, 23 Beav. 370, 53 Eng. Reprint, 145; *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 229.

¹⁴ *Cook v. State*, 110 Ala. 40, 20 South. 360; *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; *Commonwealth v. Marzynski*, 149 Mass. 68, 21 N. E. 228; *Nelson v. Cushing*, 2 Cush. (Mass.) 519, 532; *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206; *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389; *Attorney General v. Dublin*, 38 N. H. 459, 516; *Kniskern v. St. John's etc. Lutheran Churches*, 1 Sand. Ch. (N. Y.) 439; *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 633, 724; *McKinnon v. Bliss*, 21 N. Y. 206; *Gregory v. Baugh*, 4 Rand. (Va.) 611; *Nix v. Hedden*, 149 U. S. 304, 37 L. Ed. 745, 13 Sup. Ct. Rep. 881; *Jones v. United States*, 137 U. S. 202; 34 L. Ed. 691, 11 Sup. Ct. Rep. 80; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. Ed. 781; *Evans v. Getting*, 6 Car. & P. 586, 25 Eng. Crim. L. 587; *Page's Case*, 1 Leon.

242, 74 Eng. Reprint, 221; *Attorney General v. Drummond*, 1 C. & L. 210, 1 Dr. & Wal. 353; *Shore v. Attorney General*, 9 Clarke & F. 355, 8 Eng. Reprint, 450; *Brounker v. Atkyns*, Skin. 14, 90 Eng. Reprint, 8; *In re St. Catherine's Hospital*, 1 Vent. 149, 86 Eng. Reprint, 102; *Stainer v. Droitwich*, 1 Salk. 281, 91 Eng. Reprint, 247; *Clementi v. Golding*, 2 Camp. 25.

¹⁵ *Stephen v. State*, 11 Ga. 225; *Moseley v. Mastin*, 37 Ala. 216; *Weaver v. McElhenon*, 13 Mo. 89; and see *Russell v. Martin*, 15 Tex. 238, and other Texas cases cited to § 131, *ante*, note 2.

¹⁶ *Taylor v. Barclay*, 2 Sim. 221, 57 Eng. Reprint, 769; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. Rep. 80.

¹⁷ *Doe v. Lloyd*, 1 Man. & G. 685; *Chandler v. Grieves*, 2 H. Black. 606, note a.

¹⁸ *Willoughby v. Willoughby*, 1 Term Rep. 772, 99 Eng. Reprint, 1366.

¹⁹ *Rex v. Jeffries*, 1 Str. 446, 93 Eng. Reprint, 626; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660.

§ 133 (135). **Facts of which the judge has special knowledge.**—From what we have said in the last section, it will be seen that there are occasions on which the knowledge of the judge is greater than that which the court should possess; and it is hardly necessary to state that the judge has no right to act upon his own personal or special knowledge of facts as distinguished from that general knowledge which might properly be important to other persons of intelligence. More than two hundred years ago in Sir John Fenwick's trial, it was said by the solicitor general: "I do not say that a judge upon his private knowledge ought to judge, he ought not. But if a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate and go to the bar and give evidence of his knowledge."²⁰ In a Utah case one of the briefs contained the statement: "The fact that the Utah Nursery Company, a corporation, is a foreign corporation, was personally known to the county judge, had been admitted in oral argument by counsel for appellant and did not need to be proven." The court said that nothing in the record supported the statement that it was admitted by counsel that the corporation was a foreign corporation, and counsel would not seriously contend that the personal knowledge of the judge meets the requirements of the law that proof of the fact shall be made.²¹ The law is well settled upon

²⁰ 13 How. St. Tr. 663, 667; Carr v. Fair, 92 Ark. 359, 19 Ann. Cas. 906, 122 S. W. 659; Dines v. People, 39 Ill. App. 565; Stephenson v. State, 28 Ind. 272; Mayor of New Orleans v. Ripley, 5 La. 121, 25 Am. Dec. 175; Smith v. Moore, 3 How. (Miss.) 40; State v. Edwards, 19 Mo. 674; State v. Chase County School Dist. No. 24, 38 Neb. 237, 56 N. W. 791; Brown v. Lincoln, 47 N. H. 468; Purdy v. Erie R. Co., 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508; Cassidy v. McFarland, 139 N. Y. 201, 34 N. E. 893;

Wheeler v. Webster, 1 E. D. Smith (N. Y.), 1; Mannion v. International R. Co., 66 Misc. Rep. 420, 121 N. Y. Supp. 263; Mann v. County Court, 58 W. Va. 651, 52 S. E. 776; Shafer v. City of Eau Claire, 105 Wis. 239, 81 N. W. 409; Griffin v. Gibb, 2 Black (U. S.), 519, 17 L. Ed. 353; Bank of British North America v. Sherwood, 6 U. C. Q. B. 213. See interesting discussion, Thayer, Prel. Treat. on Ev., p. 291.

²¹ Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 Pac. 302.

the point that the judge's personal knowledge cannot be used—in criminal cases he should be, if not a witness, certainly not a judge—in civil cases, his knowledge must not be made apparent to the jury. Where his knowledge is concerning his profession, members of it, law books, laws outside of his own state and the like,²² such knowledge may properly be excluded from the list of those things which being strictly personal he could not use, and may be made available for his court. A judge, for example, may take notice on a motion to strike a certificate of evidence from the files on the ground that though purporting to be signed by him, it was not in fact signed by him.²³

§ 134 (135). Facts of which jurors take "judicial" notice.—Jurors are not presumed to be ignorant of what

²² *Herschfeld v. Dexel*, 12 Ga. 582; *Gates v. McClenahan* (Iowa), 103 N. W. 969; *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286; *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 South. 95; *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161; *Matter of Van Nostrand*, 3 Misc. Rep. 396, 24 N. Y. Supp. 850; *Trent v. Lechtman Printing Co.*, 141 Mo. App. 437, 126 S. W. 238; *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297.

²³ *Secrist v. Petty*, 109 Ill. 188. Other illustrations will be found in *Wheeler v. Webster*, 1 E. D. Smith (N. Y.), 1 (knowledge by members of the court of a defendant's residence); *Dines v. People*, 39 Ill. App. 565 (knowledge of clerk's knowledge of an order); *Smith v. Moore*, 4 Miss. 40 (refusal to grant administration to one on the ground of mania *a potu* as known to the judge); *State v. Lincoln Gas Co.*, 38 Neb. 33, 56 N. W. 789 (judge's personal knowledge of charges for gas-meters); *Brown v. Lincoln*, 47 N. H. 468 (judge's knowledge of a signature was held judicial—apparently contrary to the best au-

thority). In *Re Van Nostrand's Estate*, 3 Misc. Rep. 396, 24 N. Y. Supp. 850, where, on the settlement of the account of an administrator, his attorney testified that the credits claimed by the administrator on account of attorneys' fees were reasonable, it was held that the court could not act on its personal knowledge that such items were greater than the customary charges for similar services, when no evidence contrary to that given by the attorney had been submitted. This seems in conflict with the decisions in California, under which the courts in that state, when authorized to fix the value of the services of plaintiff's attorney in foreclosure suits, may act upon their own knowledge of what is a reasonable compensation, and in the absence of any evidence on the subject: *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581. See note on facts of which the court will take judicial notice appended to *Green v. Lineville Drug Co.* (150 Ala. 112, 43 South. 216), 124 Am. St. Rep. 17.

everyone else knows.²⁴ In this respect they occupy the same position as the judge with regard to matters of common knowledge and notoriety, to the extent that justice may be done without proof of those facts; for example, the usual methods of railroad transportation.²⁵ At an early stage of the common law jurors were selected because of their supposed private knowledge of the facts in issue; and they were expected to use such knowledge. "The law supposed them to have knowledge of and capacity to try the Matter in Issue (and so they must), though no Evidence were given on either side in court; but to this the Judge is a stranger, i. e., he cannot Judge without evidence though the Jury may."²⁶ But this is not the modern rule. *Jurors* cannot properly act upon their mere personal or *private knowledge* of special facts without evidence; for example, they cannot properly act upon their own private knowledge of the character of parties or of witnesses,²⁷ or of the prices of commodities, or of the state of the weather at a time past, or generally upon knowledge which is not general and common. They cannot use, for instance, their own knowledge of a witness, or their individual special knowledge.²⁸ If they have special knowledge, they should not

²⁴ Commonwealth v. Peckham, 2 Gray (Mass.), 514.

²⁵ Long v. State, 94 Ark. 570, 127 S. W. 961; Greenway v. Taylor County, 144 Iowa, 332, 122 N. W. 943; Hillerbrand v. Co., 141 Mo. App. 122, 121 S. W. 326; Moran v. Dover etc. R. Co., 74 N. H. 500, 124 Am. St. Rep. 994, 19 L. R. A., N. S., 920, 69 Atl. 881; Isaacson v. New York, C. & H. R. R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 Pac. 212; McClintock v. Charleston etc. Ry. Co., 83 S. C. 58, 64 S. E. 1009; Hoagland v. Canfield, 160 Fed. 146; Patent Button Co. v. Consolidated Fastener Co., 84 Fed. 189.

²⁶ Anonymous, Law of Evidence, published in 1735, cited by Thayer in

3 Harv. Law Rev. 300. See note to State v. Gaymon, 31 L. R. A. 489-496.

²⁷ Chattanooga R. L. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853; Schmidt v. Insurance Co., 1 Gray (Mass.), 529; Johnson v. Railway Co., 91 Wis. 233, 64 N. W. 753.

²⁸ Doggett v. Jordan, 2 Fla. 541; Pettyjohn v. Liebscher, 92 Ga. 149, 17 S. E. 1007; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853; Hathaway v. Burlington C. R. & N. R. Co., 97 Iowa, 747, 66 N. W. 892; Craver v. Hornburg, 26 Kan. 94; Hildreth v. Googins, 91 Me. 227, 39 Atl. 550; Douglass v. Trask, 77 Me. 35; Schmidt v. New York Mut. F. Ins. Co., 1 Gray (Mass.), 529; Murdock v. Sumner, 22 Pick. (Mass.) 156; Patterson v. Boston, 20 Pick. (Mass.)

sit as jurors but should convey that knowledge to the court. Shaw, C. J.,²⁹ dealing with an exception, that the learned judge instructed the jury, that as the evidence of value was matter of opinion, the jury, having taken a view, might exercise their own judgment, though if they knew of any fact, they must disclose it and testify to it in open court, said: "It appears to me that the direction of the court in this respect was singularly well guarded, and expressed with great accuracy and strictly conformable to law." The general authorities cited, therefore, as to common knowledge apply, as a rule, to jurors. They should, in the language of Barker, J.,³⁰ take with them their knowledge and experience of affairs, and are not only at liberty to use the same in drawing conclusions from the evidence, but ought to make use of the same.³¹ And they may act upon and take notice of those facts which are of such notoriety as to be matters of common knowledge.³² For example, jurors may use their *own experience* and knowledge of human nature in weighing evidence and passing on the

159; Burrows v. Delta Transp. Co., 106 Mich. 582, 29 L. R. A. 468, 64 N. W. 501; Lenahan v. People, 3 Hun (N. Y.), 164; Citizens' St. R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1085; Wharton v. State, 45 Tex. 2; Sherman v. Menominee River L. Co., 77 Wis. 14, 45 N. W. 1079; Johnson v. Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753; Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028; United States v. Fourteen Packages of Pins, 1 Gilp. 235, 25 Fed. Cas. No. 15,151.

²⁹ Parks v. Boston, 15 Pick. (Mass.) 209.

³⁰ McGarrahan v. New York N. H. & H. R. Co., 171 Mass. 211, 50 N. E. 611.

³¹ McGarrahan v. New York etc. R. Co., 171 Mass. 211, 50 N. E. 610; Wills v. Lance, 28 Or. 371, 43 Pac. 384, 487; Springfield C. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884.

As to characteristics of domestic ani-

mals as to fright, etc.: State v. Maine C. R. Co., 86 Me. 309, 29 Atl. 1086; as to modes of *stopping cars*: Swain v. Fourteenth St. Ry. Co., 93 Cal. 179, 28 Pac. 829; in determining *value*: Parks v. Boston, 15 Pick. (Mass.) 198; Murdock v. Sumner, 22 Pick. (Mass.) 156; Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028; as to the natural *instincts of self-preservation*: Chicago & E. I. Ry. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144; Hopkinson v. Knapp Co., 92 Iowa, 328, 60 N. W. 653; Chase v. Railway Co., 77 Me. 62, 52 Am. Rep. 744.

³² State v. Maine Cent. Ry. Co., 86 Me. 309, 29 Atl. 1086; Commonwealth v. Peckham, 2 Gray (Mass.), 514; Briffitt v. State, 58 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39; Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028. See note to State v. Gaymon, 31 L. R. A. 489.

credibility of witnesses.³³ As to historical facts, there seems to be a doubt, created by a Virginian case,³⁴ that jurors would not be permitted to use them as evidence. The doubt has been cleared up in a New York decision.³⁵ In that case it is said: "There are, no doubt, cases in which courts, upon questions addressed to them, may take judicial notice of matters of general history and of public and universal notoriety, which admit of no dispute; but upon the trial of issues of fact by a jury, if reliance is placed upon any matters of this sort, some evidence of them must be adduced. In all the early cases on the subject, the histories relied upon were produced at the trial."³⁶ The cause of the misconception appears to have been that the judge in charging the jury in the Virginian case had told them it was a question to be decided upon probabilities and circumstances, "among which it was lawful for the jury to consider *facts connected with the history of the country* as if formally proved to them." The error is obvious. It was not the history they were told to consider, but facts connected with it—any facts—facts which might be known to some and not to others of them. As a matter of practice, however, the same difficulty is not likely to recur. If a party intends to rely on a fact being judicially noticed, the knowledge of the court is invoked, and if successfully invoked, then *ipso facto* the jury has cognizance of it. But, as the New York and Virginian decisions both put it, if there is some fact connected with history which the jury

³³ *Jenny Electric Co. v. Branham*, 145 Ind. 314, 33 L. R. A. 395, 41 N. E. 448.

³⁴ *Gregory v. Baugh*, 4 Rand. (Va.) 611.

³⁵ *McKinnon v. Bliss*, 21 N. Y. 206.

³⁶ Thus, in the case of *St. Catherine's Hospital* (1 Vent. 149, 86 Eng. Reprint, 102), where the question was as to the right of a queen dowager to appoint a master of the hospital, it having been decided in 4 Edward III that she had no such right, Lord Hale

allowed it to be "*shown out of Speed's Chronicles, produced in court*, that Queen Isabel was under great calamity and oppression, and what was then determined against her, was not so much from the right of the thing, as the iniquity of the times." So, in the case of *Lord Brouncker v. Sir R. Atkins* (Skin. 14, 90 Eng. Reprint, 8), "*Speed's Chronicles was given in evidence*, to prove the death of Isabel, Queen Dowager of Edward II."

are to be asked to consider, then there must be some proper foundation laid. If the judge gives his sanction then the court is seised judicially and as we shall show in the next section the knowledge will reach the jury. The two cases referred to have merely declared what the law has been for a long time, and the Virginian decision was rendered necessary by a faulty charge to a jury in the first instance.

§ 134a. Pleading—Proof and procedure in respect to facts to be judicially noticed.—Such is the law of judicial notice, and it remains to deal with the force with and the directions in which it may be applied in ordinary procedure. It is hardly necessary to add that *no evidence* need be given of those facts of which the court should take judicial notice. If the memory of the judge is at fault, he may refer to such sources of information as have already been indicated, or he may refuse to take judicial notice of the matter in question, until the party asking him to do so can produce some document at the trial by which his memory may be refreshed. It has been held repeatedly that the court may refuse to hear evidence concerning that of which it will take judicial notice;³⁷ although it is not prejudicial error if it does.³⁸ It has, however, been held that when a matter is one which should be within the judicial knowledge of the court, it is to be determined by it in

³⁷ Russell v. Huntsville R. L. & P. Co., 137 Ala. 627, 34 South. 855; Cox v. State, 68 Ark. 462, 60 S. W. 27; Gaylor's Appeal, 43 Conn. 82; Lynn v. People, 170 Ill. 527, 48 N. E. 964; State v. Chingren, 105 Iowa, 169, 74 N. W. 946; Topeka v. Tuttle, 5 Kan. 311; White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167; Moynihan v. Holyoke, 193 Mass. 26, 78 N. E. 742; Commonwealth v. Pear, 183 Mass. 242, 67 L. R. A. 935, 66 N. E. 719; Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389; Chapman v. Currie, 51 Mo. App. 40; Ex parte Kair, 28 Nev. 127, 113 Am. St. Rep. 817, 6 Ann. Cas.

893, 80 Pac. 463; Ex parte Lair, 177 Fed. 789.

³⁸ Cook v. State, 110 Ala. 40, 20 South. 360; Cox v. Board of Trustees, 161 Ala. 639, 49 South. 814; Kansas City S. R. Co. v. State, 90 Ark. 343, 119 S. W. 288; People v. Hagar, 52 Cal. 171; Williams v. State, 67 Ga. 260; Wabash R. Co. v. Campbell, 219 Ill. 312, 3 L. R. A., N. S., 1092, 76 N. E. 346; Hizer v. State, 12 Ind. 330; Grimes v. Eddy, 126 Mo. 168, 47 Am. St. Rep. 653, 26 L. R. A. 638, 28 S. W. 756; Lendle v. Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894.

the same manner as a legal proposition, and cannot be made an "issue" between the parties to be determined by the court in each case upon conflicting evidence presented in that case. For the purpose of informing itself, the court might inquire of others, or refer to books or documents, or any other source of information which it might deem authentic, but its action in this respect is not a part of the trial of issues in the action. Matters of which a court takes judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; and the failure or refusal of a trial court to take such notice does not prevent the appellate court from giving proper effect thereto.³⁹ As we have stated, if there is a doubt as to the propriety of taking judicial notice, the proper method is for the court to disclaim it and allow it to be proved in the ordinary way. *A fortiori*, if, in addition to the court's doubt, there is any assertion of denial of the fact referred to.⁴⁰ Briefly stated, proof is never required of a fact of which the court is bound to take judicial notice;⁴¹ and no issue can be joined upon matter judicially known.⁴² The denial of such a fact cannot be pleaded, and it is not admitted by demurrer.⁴³ Once a fact has been judicially recognized it follows that it may be used in the instructions and the address of counsel to the jury. For example, the court will take judicial notice of the time when the moon rose on a particular night, and it may inform itself from any source of information; and

³⁹ *Hunter v. New York etc. R. R. Co.*, 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Gilbert v. Flint & P. M. R. Co.*, 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868.

⁴⁰ *Dougherty v. Bethune*, 7 Ga. 90. In the last-named case the decision was, that the recital of a fact in a public statute did not operate to estop a party defendant from denying it by plea, and putting the fact in

issue. It was not held that it was necessary for a plaintiff suing to set forth such a fact, although it were recited by a public statute; but simply that the defendant might deny it in his plea, and in this event the plaintiff must prove it: *Lane v. Harris*, 16 Ga. 222.

⁴¹ *Secrist v. Petty*, 109 Ill. 188.

⁴² *Board of Commrs. v. Burford*, 93 Ind. 383; *Attorney General v. Foote*, 11 Wis. 14, 78 Am. Dec. 689.

⁴³ *Cooke v. Tallman*, 40 Iowa, 133.

it is not competent to assail the correctness of an instruction to the jury upon that subject by affidavits contradictory of the correctness of the statement of the court; and, in the absence of manifest error, the fact as stated by the trial court will be presumed correct on appeal, and appellant must show affirmatively that the court erred in its statement.⁴⁴ There is an apparent conflict on the question whether on general demurrer judicial notice can be used of facts opposed to the averments of the complaint. We shall notice specially only the opinions from the states of California and Wisconsin and the United States supreme court (which decision was on a case from California), as they contain sufficient reference for purposes of inquiry. In the case from the first-named state,⁴⁵ Beatty, C. J., said: "The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. This is undeniably true with respect to laws establishing general rules of right or obligation, and there is no reason why it should not be held equally true in respect to a law which merely determines the *status* of a particular thing. Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be

⁴⁴ *People v. Mayes*, 113 Cal. 618, 45 Pac. 860, and in *The State v. Laffer*, 38 Iowa, 422, we find: "The court was authorized to take judicial notice that the town of Sigourney was the county seat of and within the county of Keokuk, and to so tell the jury": *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 South. 169; *Topeka v. Zufall*, 40 Kan. 47, 1 L. R. A. 387, 19 Pac. 359; *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737; *Cash v. State*, 10 Humph. (Tenn.) 111; *Spiking v. Consolidated Ry. etc. Co.*, 33 Utah,

313, 93 Pac. 838; *Hoagland v. Canfield*, 160 Fed. 146.

⁴⁵ *People v. Oakland Waterfront Co.*, 118 Cal. 234, 245, 50 Pac. 305, citing in support *Cole v. Segraves*, 88 Cal. 104, 25 Pac. 1109; *Fackler v. Wright*, 86 Cal. 210, 24 Pac. 996; *Rogers v. Cady*, 104 Cal. 290, 43 Am. St. Rep. 100, 38 Pac. 81; *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; *Mullan v. State*, 114 Cal. 581, 34 L. R. A. 262, 46 Pac. 670, and referring to *Chapman v. Wilber*, 6 Hill (N. Y.), 475.

attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves, and make it entirely clear that there are no considerations of expediency or convenience to support the contention of appellant. . . . The highest courts of other states have followed the same rule in the cases cited in the briefs of counsel, to which we deem it unnecessary to make more particular reference.”⁴⁶ In the Wisconsin case the complaint set forth *inter alia* that Rock river was a navigable stream. This complaint was demurred to. The trial court sustained the defendant’s demurrer to the complaint, on the ground that, notwithstanding the averments of the complaint that Rock river was a navigable stream, and in contradiction of such averments, the judge of that court would take judicial notice that the river was not navigable in fact for logs, lumber, timber, or rafts, and that therefore the action could not be maintained. The appellate court said that the decision involved a proposition of which they could not approve, namely, that upon a question of the kind presented by an assertion of navigability in fact for some public purposes the court could deprive a suitor of trial or hearing and foreclose him upon such inquiry by setting the court’s own knowledge or judicial notice in opposition to the averments of his complaint.⁴⁷ In the case in the United States supreme court⁴⁸ Mr. Justice Wayne said: “The only point, in our view of the case, when it was on its hearing in the court below, was, whether the complainant had not shown, by the facts stated on the face of his bill, artificial as it

⁴⁶ The case of Southern Pac. R. Co. v. Groeck, 68 Fed. 609, followed the opinion of Beatty, C. J., referred to, and Rome Ry. & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468 (“fairly construed, the petition in this case asserts a physical impossibility, and is therefore demurrable”).

⁴⁷ State v. Norcross, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

⁴⁸ Griffing v. Gibb, 2 Black (U. S.), 519, 17 L. Ed. 353, followed in People v. Michigan Cent. R. Co., 145 Mich. 140; 108 N. W. 772.

may be in point of form, a case for relief within the jurisdiction of a court of equity. We think it to be so, and shall remand it to the court below for amendment and further procedure, as, in the judgment of that court, the case may require. We further observe that the filing of a general demurrer was not, on the pleadings and facts of the case, a proper defense. The defendants might have resorted to a plea alleging matter, which, if appearing on the face of the bill, would have been a good cause of demurrer, or the bill should have been answered. The demurrer filed was a denial, in form and substance, of the right of complainant to have his case considered in a court of equity, but an admission that all the allegations of it which were properly pleaded were true. In respect to what was said in the argument that this court would, on the general demurrer of the defendants, judicially notice the acts of California relating to the Harbor of San Francisco and particularly of the Water Lot Act of the 26th March, 1851, we will only remark that we should do so if the pleading in the case was such as permitted it to be done, and if we did not think, as we have already said, that upon that plea that the cause should not have been dismissed, and that the courts should have ruled in favor of the complainant." In the face of this apparent conflict, the seeker for the correct proposition, outside of the necessary regard to the laws of the state in which his action will be tried, will be forced to the conclusion that a demurrer will not be aided by facts of which the court is required to take judicial notice to the extent of requiring the court to find the fact against a direct admitted averment. When it is remembered that judicial notice may be combated by evidence from the opponent when its aid is invoked by a party,⁴⁹ it appeals persuasively to our reason that the conclusion of an anticipated trial should not be thus reached on the demurrer. True it is that there can be no combat as to the court taking judicial notice of the laws, and the apparently conflicting cases **may**

⁴⁹ *State v. Norcross, supra.*

well be reconciled by regarding the sound law to be that the judge must exercise that knowledge of the laws of his country in dealing with a demurrer to a complaint which carries a claim in contravention of such laws, but that where, in order to defeat such claim, it would be necessary to take judicial notice of facts of which the courts do ordinarily take judicial notice, the demurrer must be dealt with on the basis of the facts appearing in the complaint. In the one case it is the judge's knowledge of the law; in the other his knowledge that certain facts are judicially noticed; in the one case he *must* take notice, while in the other there is no compulsion, and in this latter case, the nature of the subject, the issue, the apparent justice of the case, the court's own information, and the means of information at hand are factors in determining the judicial cognizance.⁵⁰ There is no necessity either to plead or prove any fact of which judicial notice will be taken, since it is of the very essence of such facts that they are of common knowledge, and on the principle that it is not good pleading to set out the law at length, the court will strike out that of which judicial notice will be taken.⁵¹ The pleader

⁵⁰ *Porter v. Waring*, 2 Abb. N. C. 230, and the pithy note of Mr. Abbott thereto.

⁵¹ *Louisville & N. R. Co. v. Mother-shed*, 97 Ala. 261, 12 South. 714; *St. Louis, Iron Mt. & S. R. Co. v. State*, 68 Ark. 561, 60 S. W. 654; *French v. Senate*, 146 Cal. 604, 2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031; *Tweedy v. Jarvis*, 27 Conn. 42; *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494; *Sanford v. Gaddis*, 13 Ill. 329; *Goodman v. People*, 228 Ill. 154, 81 N. E. 830; *Chicago B. & Q. R. Co. v. Warner*, 108 Ill. 538; *Secrist v. Petty*, 109 Ill. 188; *Hammann v. Mink*, 99 Ind. 279; *State v. Downs*, 148 Ind. 324, 47 N. E. 670; *Clough v. Goggins*, 40 Iowa, 325; *Sun*

Ins. Off. v. Western Woolen Mill Co., 72 Kan. 41, 82 Pac. 513; *West v. City of Columbus*, 20 Kan. 633; *City of Solomon v. Hughes*, 24 Kan. 211; *Ellis v. Reddin*, 12 Kan. 306; *Pedigo v. Commonwealth*, 24 Ky. Law Rep. 1029, 70 S. W. 659; *Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1, 63; *Taylor v. Lodge*, 101 Minn. 72, 118 Am. St. Rep. 606, 11 Ann. Cas. 260, 11 L. R. A., N. S., 92, 111 N. W. 919; *Peterson v. Village of Cokato*, 84 Minn. 205, 87 N. W. 615; *Garth v. Caldwell*, 72 Mo. 622; *State v. Lingle*, 128 Mo. 528, 31 S. W. 20; *State v. Scott*, 59 Neb. 499, 81 N. W. 305; *Redell v. Moores*, 63 Neb. 219, 93 Am. St. Rep. 431, 55 L. R. A. 740, 88 N. W. 243; *George v. State*, 59 Neb. 163, 80 N. W. 486; *Hall v. Brown*, 58 N.

has to face either the Scylla of the demurrer or the Charybdis of not having pleaded that which he expected the court would judicially notice but did not. Of the two evils he will assuredly choose the risk of the demurrer, and thus be assured by the intimation given if it is sustained, that there will exist no necessity for proof of the otherwise doubtful proposition. Nor can parties stipulate judicial notice out of existence by agreements or admissions. For example, courts do not allow parties to stipulate or agree, or admit by pleading, that a statute was not properly or constitutionally passed by the legislature. If the constitution has not been complied with in the passage of an act, that fact must be shown by the printed journals, or the certificate of the Secretary of State, the custodian of legislative proceedings. Such fact cannot rest in parol.⁵² And unless the journal shows affirmatively that the constitutional directions were not complied with, it must be presumed that they were followed.⁵³

H. 93; Viemeister v. White, 179 N. Y. 235, 103 Am. St. Rep. 859, 1 Ann. Cas. 334, 70 L. R. A. 796, 72 N. E. 97; Pugh v. State, 2 Head (Tenn.), 227; Clement v. Graham, 78 Vt. 290, 63 Atl. 146; Page v. McClure, 79 Vt. 83, 64 Atl. 451; Satterfield v. Commonwealth, 105 Va. 867, 52 S. E. 979; Bolton v. Ovitt, 80 Vt. 362, 67 Atl. 881; Hart v. Baltimore & O. R. Co., 6 W. Va. 336; O'Brien L. Co. v. Wilkinson, 123 Wis. 272, 101 N. W.

1050; Durch v. Chippewa Co., 60 Wis. 227, 19 N. W. 79; King v. Gallun, 109 U. S. 99, 27 L. Ed. 870, 3 Sup. Ct. Rep. 85; Crawcour v. Salter, 18 Ch. Div. 30.

⁵² Happel v. Brethauer, 70 Ill. 166, 22 Am. Rep. 70.

⁵³ Schuyler Co. v. People, 25 Ill. 181; Russ v. City of Boston, 157 Mass. 60, 31 N. E. 708; Attorney General v. Rice, 64 Mich. 385, 31 N. W. 203.

CHAPTER 5.

RELEVANCY.

- § 135. Relevancy—In General.
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- § 137. Logical Connection Between Fact Offered and Fact to be Proved—
Illustrations.
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Inter Alios Acta.
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- § 141. Facts Apparently Collateral may Become Relevant—Necessary for
Promise to Connect.
- § 141a. Same—Custom—Cause and Effect.
- § 142. Same—Knowledge—Intent.
- § 143. Same—Proof of Other Crimes Than the One in Issue.
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- § 150. Same—Nature of Proof—Pleadings.
- § 150a. Same—Limitation of Attack to Plaintiff's General Reputation.
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- § 151. Character—Actions for Breach of Promise of Marriage—Unchastity
as a Defense.
- § 151a. Same—Mitigation of Damages.
- § 152. Same—Seduction and Criminal Conversation.
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- § 154. Character in Actions for Fraud.
- § 155. Same—Illustrations.
- § 156. Same—Homicide.
- § 157. Character—Actions for Malicious Prosecution.
- § 158. Proof of Good Character.

- § 159. Proof of Financial Standing of Defendant—Exemplary Damages—Compensatory Damages.
- § 160. Same, Continued.
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- § 163. Relevancy of Facts Apparently Collateral—Negligence Cases.
- § 164. Same, Continued—Cause and Effect.
- § 165. Same, Continued—Habits of Animals.
- § 166. Relevancy of Disconnected Facts to Show Defective Machinery.
- § 166a. Same—Railroad Fires.
- § 166b. Same—Other Fires Caused by Engine.
- § 166c. Same—Fires Caused by Other Engines.
- § 167. Same, Continued.
- § 168. Facts Apparently Collateral—Value of Lands.
- § 169. Same—Value of Personal Property—Services.
- § 170. Direct Proof of Intent, Motives and Belief.
- § 170a. Same—Illustrations.
- § 171. Evidence Made Relevant by That of the Adverse Party.
- § 172. Same—Rebuttal or Explanation of Irrelevant Testimony.
- § 173. General Rules as to Relevancy.
- § 174. Province of Judge and Jury.
- § 174a. Same—Illustrations of Questions of Law.
- § 174b. Same—Illustrations of Questions of Fact.
- § 175. Same—Mixed Questions of Law and Fact.
- § 175a. Same—Construction of Writings—Statutes, etc.
- § 175b. Same—Limitation of the Rule as to Writings.
- § 175c. Same—Criminal Cases—The Court Decides Questions of Law.
- § 175d. Review.

§ 135 (136). Relevancy — In general. — It frequently happens that the study of a department of a subject necessitates a reference to the fundamental terminology, and experience has shown that words of every-day use sometimes prove elusive when their real meaning in the required connotation is to be captured. Among lawyers "relevant" and "relevancy" are as of common use as "parol evidence" and "burden of proof," but suddenly confronted with the query of what *is* relevancy, a satisfying definition will be more often anticipated than obtained. The colloquial meaning of the term helps but little. That relevant ordinarily means pertinent or applicable to the purpose carries no information as to its legal signification. The meaning according to the Scottish law comes nearer to our conception of it, namely, the sufficiency in law of what is

alleged in support or defense of an action.¹ Applied to testimony, the meaning of the word "relevant" is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. "Whatever testimony was offered, which would assist in knowing which party spoke the truth of the issue, was relevant; and when to admit it did not override other formal rules of evidence it ought to have been taken."² It is not necessary, however, that it should in itself bear directly upon the point in issue, for, if it be but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant.³ "Of all rules of evidence, the most universal and most obvious is this, that the evidence adduced should be alike directed and confined to matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters, which either are in dispute between contending parties or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside, as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. '*Frustra probatur quod probatum non relevat.*'"⁴ Notwithstanding the great importance of this rule it will not be necessary to give it so elaborate a discussion as some of the other rules of evidence. Other chapters of the work abound in illustrations of the subject. For example, the subjects of admissions, opinion evidence, *res gestae*, hearsay, book entries and even other subjects, might logically enough be grouped under the general title of relevancy. But it is deemed best to

¹ See Standard Dictionary.

² *Platner v. Platner*, 78 N. Y. 90 (the word comes from the French, *reliever*, to assist); *Prior v. Oglesby*, 50 Fla. 248, 39 South. 593.

³ *Schuchardt v. Allen*, 1 Wall. (U. S.) 359, 17 L. Ed. 642; *Hunter*

v. Harris, 131 Ill. 482, 23 N. E. 626; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *San Antonio Traction Co. v. Higdon* (Tex. Civ. App.), 123 S. W. 732.

⁴ *Best, Ev.*, 10th ed., § 251.

adopt the more usual classifications, and therefore under this heading we shall only illustrate the meaning of the general rule and treat of certain classes of testimony, which form apparent exceptions to the rule, and which are not discussed in other chapters. According to Stephen, "the word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence, or nonexistence of the other."⁵ Wharton defines relevancy as "that which conduces to the proof of a pertinent hypothesis."⁶ In the courts there have been several attempts to get closer to a pregnant definition. Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. "If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury." The question as to its admission or rejection addresses itself to the court as one to be answered with a view to practical, rather than theoretical considerations.⁷ One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with

⁵ Stephen, *Ev.*, art. 1, p. 4; *Platner v. Platner*, 78 N. Y. 90; *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572; *Locke v. Kraut*, 85 Conn. 486, 83 Atl. 626. For example, in an action for the price of a shaft for a steamer, which was defended on the ground of defects, it was irrelevant to show what the effect on the steamer would have been had such shaft broken:

Stockton Iron Works v. Walters, 18 Cal. App. 373, 123 Pac. 240.

⁶ 1 Whart. *Ev.*, § 20; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44.

⁷ *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Insurance Co. v. Weide*, 11 Wall. (U. S.) 438, 20 L. Ed. 197; *Thayer, Cas. Ev.*, 2, 3.

other facts, renders the existence of the other certain or more probable.⁸ In the application of the principle that whatever is relevant is admissible, on which the common law, as to the reception of evidence, has been built, courts do not forget that trials must be kept within reasonable bounds as to the time they occupy and the range they cover. Evidence may be relevant and yet its relevancy may be so slight and inconsequential that to receive it would be to distract attention that ought to be concentrated on what bears directly on vital points, and to confuse rather than to illuminate the case. In determining whether any particular testimony offered on a jury trial belongs to this category or not, a certain discretion is necessarily vested in the presiding judge.⁹ "Relevancy," as that term is used by writers on the law of evidence, omitting metaphysical distinctions, is that which "conduces to prove a pertinent theory in a case."¹⁰ But in view of the complexity of human affairs and the infinite variety which questions of fact assume in courts of justice, it is obvious that no definition of the term "relevancy" can be very satisfactory or afford any very practical aid.¹¹ Reforms in the rules of pleading have no doubt simplified the subject, and it is no longer necessary in a work upon evidence to elaborately discuss the different forms of issues, or the subject of variance, or other subjects connected with the technicalities of pleading. But there is no definition or statute or theory of relevancy which can very greatly aid in solving the constantly recurring problem, whether a given fact offered in evidence is relevant to prove the proposition in issue. Thayer, who seems of all the writers on evidence

⁸ *State v. Blake*, 69 Conn. 64, '36 Atl. 1019.

⁹ *Baldwin, C. J.*, in *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054. See, also, *Rosenstein v. Fair Haven & W. R. Co.*, 78 Conn. 29, 60 Atl. 1061; *Leonard v. Gillette*, 79 Conn. 664, 66 Atl. 502; *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295; *Fishman v. Consumers'*

Brewing Co., 78 N. J. L. 300, 73 Atl. 231; *San Antonio T. Co. v. Higdon* (Tex. Civ. App.), 123 S. W. 732.

¹⁰ *Levy v. Campbell* (Tex.), 20 S. W. 196.

¹¹ *Thayer, Prelim. Tr. on Ev.*, p. 265; *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998.

to have not only acquired a giant grasp of his subject, but to have combined with it a Byronic facility of diction and clarity of expression, says:¹² "There is a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical systems—which forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."¹³ The same rule applies in criminal as in civil cases.¹⁴ The rules of logic are therefore called into operation to determine the question of relevancy; and it may be said generally that, whatever naturally and logically tends to establish a fact in issue is relevant, and that which does not answer these requirements is not. In other words, the testimony offered must be logically probative of the matter to be proved, and if it is it is legally relevant.¹⁵

¹² At the risk of the eulogy contained in these words being thought extravagant, it is well to say they are advisedly adopted in speaking of Professor Thayer. From the careful perusal and study of his work it may unhesitatingly be said that he impresses his great subject with a marked individuality and an originality of treatment which is as exhilarating as it is instructive.

¹³ Thayer, *Prel. Treat. on Ev.*, 264. Although the code states have enacted that certain facts shall be relevant, it is apparent that the instances of testimony made relevant by statute only emphasize the absence of a test.

¹⁴ *Bell v. Troy*, 35 Ala. 184.

¹⁵ *Marx v. Kilby etc.* *Mach. Wks.*,

162 Ala. 295, 136 Am. St. Rep. 24, 50 South. 136; *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 South. 362; *Vernon v. Wedgeworth*, 148 Ala. 490, 42 South. 749; *Bolton v. State*, 146 Ala. 691, 40 South. 409; *Dobbins v. Little Rock R. etc. Co.*, 79 Ark. 85, 9 Ann. Cas. 84, 95 S. W. 794; *Green v. State*, 59 Ark. 246, 27 S. W. 5; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299; *Luitweiler etc. Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 198, 116 Pac. 707; *East Shore Lumber Co. v. Healy-Tibbits Constr. Co.*, 15 Cal. App. 407, 114 Pac. 1016; *O'Rourke v. Finch*, 9 Cal. App. 324, 99 Pac. 392; *Breuner Co. v. King*, 9 Cal. App. 271, 98 Pac. 1077; *State v. Sebastian*, 80 Conn. 1, 69 Atl. 1054; *Floral C. Co. v. Dillon*, 83 Conn. 65,

While this proposition, of course, includes direct evidence, it does not exclude, as irrelevant, evidence of facts not di-

- 74 Atl. 82; *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Beach v. Schroeder*, 47 Colo. 312, 107 Pac. 271; *Colorado etc. R. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915; *Hannan v. Anderson*, 15 Colo. App. 433, 62 Pac. 961; *Dougherty v. White* (Del.), 80 Atl. 237; *Melrose Mfg. Co. v. Kennedy*, 59 Fla. 312, 51 South. 595; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 South. 410; *Clary v. Isom*, 56 Fla. 236, 47 South. 919; *Alexander v. State*, 7 Ga. App. 88, 66 S. E. 274; *Langston v. Postal Tel. Cable Co.*, 6 Ga. App. 833, 65 S. E. 1094; *Tow-aliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844; *Summitt Wagon Co. v. Lowery*, 6 Ga. App. 147, 64 S. E. 489; *Chicago City R. Co. v. Lannon*, 212 Ill. 477, 72 N. E. 585; *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963; *Southern Collegiate Inst. v. Avery*, 157 Ill. App. 568; *Smith v. Cleveland etc. R. Co.*, 149 Ill. App. 348; *Loomis v. Stevens*, 18 Ind. App. 184, 47 N. E. 237; *Hall v. Stanley*, 86 Ind. 219; *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778; *West v. Cavins*, 74 Ind. 265; *Stoeckle v. Cereal Co.*, 150 Iowa, 383, 130 N. W. 157; *Leader v. Farmers' L. & T. Co.*, 144 Iowa, 180, 122 N. W. 833; *Biermann v. Guaranty etc. Ins. Co.*, 142 Iowa, 341, 120 N. W. 963; *Campbell v. Collins*, 133 Iowa, 152, 110 N. W. 435; *State v. High*, 122 La. 521, 47 South. 878; *State v. Gebbia*, 121 La. 1083, 47 South. 32; *Meyer v. Farmer*, 36 La. Ann. 785; *Stanley v. Penny*, 75 Kan. 179, 88 Pac. 875; *Cornelius v. Atchison etc. R. Co.*, 74 Kan. 599, 87 Pac. 751; *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52; *Louisville R. Co. v. Ellerhorst*, 129 Ky. 142, 110 S. W. 823, 33 Ky. Law Rep. 605; *McGrew v. O'Donnell*, 28 Ky. Law Rep. 1366, 92 S. W. 301; *Nesbit v. Gregory*, 7 J. J. Marsh. (Ky.) 270; *Robbins v. Lewiston R. Co.*, 107 Me. 42, 77 Atl. 537; *Provencher v. Moore*, 105 Me. 87, 72 Atl. 880; *Nickerson v. Gould*, 82 Me. 512, 20 Atl. 86; *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342; *Brooke v. Winters*, 39 Md. 505; *Dorsey v. Whipps*, 8 Gill (Md.), 457, 475; *Bock v. Wall*, 207 Mass. 506, 93 N. E. 821; *Clark v. Hull*, 184 Mass. 164, 68 N. E. 60; *Brierly v. Davol Mills*, 128 Mass. 291; *Hill v. Crompton*, 119 Mass. 367, 376; *Kennedy v. Ins. Co.*, 157 Mich. 411, 122 N. W. 134; *Beasore v. Stevens*, 155 Mich. 403, 119 N. W. 431; *Mott v. Penoyar*, 153 Mich. 273, 116 N. W. 1110; *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *Glassberg v. Olson*, 89 Minn. 195, 94 N. W. 554; *Cox v. Polk*, 139 Mo. App. 260, 123 S. W. 102; *Aetna Ins. Co. v. Missouri etc. R. Co.*, 123 Mo. App. 513, 100 S. W. 569; *Steltmeier v. Barrett*, 115 Mo. App. 323, 91 S. W. 56; *Lillie v. Modern Woodmen*, 89 Neb. 1, 130 N. W. 1004; *Stevens v. State*, 84 Neb. 759, 19 Ann. Cas. 121, 122 N. W. 58; *Raapke etc. Co. v. Schmoller etc. Piano Co.*, 82 Neb. 716, 118 N. W. 652; *Arabian Horse Co. v. Bivens*, 4 Neb. (Unof.) 823, 96 N. W. 621; *Ex parte Kair*, 23 Nev. 425, 6 Ann. Cas. 893, 82 Pac. 453; *State v. Rhoades*, 6 Nev. 352; *Connecticut R. P. Co. v. Dickinson*, 75 N. H. 353, 74 Atl. 585; *Reagan v. Manchester St. R. Co.*, 72 N. H. 298, 56 Atl. 314; *Green v. Gilbert*, 60 N. H. 146; *Fishman v. Consumers' Brewing Co.*, 78 N. J. L. 300, 73 Atl. 231; *American Process P. Co. v. Pensauken Brick Co.*, 78 N. J. L. 658, 75 Atl.

rectly in issue but which create a presumption of the fact

976; *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295; *Palatine Ins. Co. v. Santa Fe Mercantile Co.*, 13 N. M. 241, 82 Pac. 363; *Rosenberg v. Surety Co.*, 140 App. Div. 436, 125 N. Y. Supp. 257; *Abrams v. Manhattan etc. Brewing Co.*, 90 N. Y. Supp. 425; *In re Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. Supp. 1059; *Deutschmann v. Third Ave. R. Co.*, 87 App. Div. 503, 84 N. Y. Supp. 887; *O'Horo v. Kelsey*, 60 App. Div. 604, 70 N. Y. Supp. 14; *Kornegay v. R. Co.*, 154 N. C. 389, 70 S. E. 731; *State v. McDonald*, 152 N. C. 802, 67 S. E. 762; *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99; *Findlay Brew. Co. v. Bauer*, 50 Ohio St. 560, 40 Am. St. Rep. 686, 35 N. E. 55; *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679; *Tompkins v. Starr*, 41 Ohio St. 305; *Indian Land etc. Co. v. Clement (Okl.)*, 109 Pac. 1089; *Drum-Flato Comm. Co. v. Edmisson*, 17 Okl. 344, 87 Pac. 311; *McIntosh v. McNair*, 53 Or. 87, 99 Pac. 74; *State v. Dunn*, 53 Or. 304, 99 Pac. 278, 100 Pac. 258; *Atkins v. Payne*, 190 Pa. 5, 42 Atl. 378; *Express Pub. Co. v. Aldine Press*, 126 Pa. 347, 17 Atl. 608; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *National Bk. v. Thomas*, 30 R. I. 294, 74 Atl. 1092; *Carr v. American Locomotive Co.*, 29 R. I. 276, 70 Atl. 196; *Blakely v. Frazier*, 20 S. C. 144; *Norbeck etc. Co. v. Mallock*, 26 S. D. 54, 127 N. W. 471; *Davis v. Min. Co.*, 20 S. D. 399, 107 N. W. 374; *Fry v. Provident Sav. L. Assur. Soc. (Tenn. Ch.)*, 38 S. W. 116; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Heatherly v. Bridges*, 1 Heisk. (Tenn.) 220; *Dudley v. Strain (Tex. Civ. App.)*, 130 S. W. 778; *Deneaner v. State*, 58 Tex. Cr.

624, 127 S. W. 201; *San Antonio Tract Co. v. Higdon (Tex. Civ. App.)*, 123 S. W. 732; *Tubbs v. State*, 50 Tex. Cr. 143, 95 S. W. 112; *State v. Min. Co.*, 37 Utah, 62, 106 Pac. 520; *Jensen v. McCornick*, 26 Utah, 142, 72 Pac. 630; *Mears v. Daniels*, 84 Vt. 91, 78 Atl. 737; *Berry v. Doolittle*, 82 Vt. 471, 74 Atl. 97; *Holbrook v. Quinlan (Vt.)*, 80 Atl. 339; *Interstate Coal etc. Co. v. Clintwood Coal etc. Co.*, 105 Va. 574, 54 S. E. 593; *Murray v. Moore*, 104 Va. 707, 52 S. E. 381; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 643; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629; *Garberson v. Freight Co.*, 51 Wash. 213, 98 Pac. 612; *Chicago Art Co. v. Thacker*, 65 W. Va. 143, 63 S. E. 770; *Hollen v. Crim*, 62 W. Va. 451, 59 S. E. 172; *Kirchner v. Smith*, 61 W. Va. 434, 11 Ann. Cas. 870, 58 S. E. 614; *Monture v. Regling*, 140 Wis. 407, 122 N. W. 1129; *United American Ins. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 994; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. Ed. 319, 1 Sup. Ct. Rep. 178; *Butler v. Walkins*, 13 Wall. (U. S.) 456, 20 L. Ed. 629; *Insurance Co. v. Weide*, 11 Wall. (U. S.) 438, 20 L. Ed. 197; *Thompson v. Bowie*, 4 Wall. (U. S.) 463, 18 L. Ed. 423; *Masner v. Atchison etc. R. Co.*, 177 Fed. 618, 101 C. C. A. 244; *Hoagland v. Canfield*, 160 Fed. 146; *Wyman v. Lehigh Valley R. Co.*, 158 Fed. 957, 86 C. C. A. 161; *Texas etc. Ry. Co. v. Coutourie*, 135 Fed. 465, 68 C. C. A. 177; *Brownell v. Brownell*, 42 Can. S. Ct. 36; *Rex v. Ellis*, 6 Barn. & C. 145, 13 Eng. Com. L. 123; *Rex v. Egerton*, 1 Russ. & Ry. (C. C.) 375; *Rex v. Watson*, 2 Stark. 116, 3 Eng. Com. L. 273.

in issue.¹⁶ The qualification to the general rule is that it does not always follow, merely because a fact is logically relevant that it is always admissible. There may be a very great number of minute details, all logically relevant, but which if they existed in many cases, would take such a long time to be given in evidence, that the business of the courts would be clogged. As was said by Doe, C. J.:¹⁷ "The trial to which parties are entitled is not an endless one nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed, upon collateral issues, an equal range, amply sufficient for the purposes of justice, under the circumstances of the particular case, they are not necessarily entitled, as a matter of law,

¹⁶ *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380; *People v. Phipps*, 39 Cal. 326; *Girard v. Grosvenor-dale Co.*, 83 Conn. 20, 74 Atl. 1126; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Vaughn's S. S. v. String-fellow*, 56 Fla. 708, 48 South. 410; *Carswell v. State*, 7 Ga. App. 198, 66 S. E. 488; *Todd v. German-American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94; *Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52; *Metropolitan Ins. Co. v. Maddox (Ky.)*, 127 S. W. 503; *Louisville R. Co. v. Ellerhorst*, 33 Ky. Law Rep. 605, 110 S. W. 823; *State v. Coleman*, 22 La. Ann. 455; *Hindle v. Healy*, 204 Mass. 48, 90 N. E. 511; *Powers v. Old Colony St. R. Co.*, 201 Mass. 66, 87 N. E. 192; *Laplane v. Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 294; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Pitts v. State*, 43 Miss. 472; *Lloyd C. Co. v. Mather etc. Rag. Co. (Mo. App.)*, 123 S. W. 528; *State v. Avery*, 113 Mo. 475, 21 S.

W. 193; *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834, 113 N. W. 627; *State v. Van Winkle*, 6 Nev. 340; *Ripley v. Miller*, 46 N. C. (1 Jones) 479, 62 Am. Dec. 177; *Mahoney v. Smith*, 132 App. Div. 291, 116 N. Y. Supp. 1091; *State Bank v. Southern Nat. Bank*, 170 N. Y. 1, 62 N. E. 677; *People v. Hamilton*, 137 N. Y. 531, 32 N. E. 1071; *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Mason v. Raplee*, 66 Barb. (N. Y.) 180; *Dale v. Brooklyn City etc. R. Co.*, 3 *Thomp. & C. (N. Y.)* 686; *Mulligan v. Southern R. Co.*, 84 S. C. 171, 65 S. E. 1040; *Ware v. Shafer (Tex. Civ. App. 1894)*, 27 S. W. 764; *Moreno v. State (Tex. Cr.)*, 21 S. W. 924; *Fentress v. Steele*, 110 Va. 573, 66 S. E. 870; *State v. Cool*, 66 W. Va. 86, 66 S. E. 740; *Spick v. State*, 140 Wis. 104, 121 N. W. 664; *Rogers v. London & Canadian etc. Co.*, 18 Ont. L. R. (Can.) 8.

¹⁷ *Amoskeag Co. v. Head*, 59 N. H. 332.

to go further in that direction." Certain evidence, though not legally incompetent, may be excluded on the ground that, as a matter of fact, it has so slight or remote a bearing on the case, either in point of time or value, that it would be unjust and unreasonable to prolong and complicate a trial by its investigation,¹⁸ and the court may exercise a discretion in excluding it on those grounds.¹⁹

¹⁸ *State v. Boston & M. R. R.*, 58 N. H. 410.

¹⁹ *Louisville etc. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35; *Watson v. Beyers*, 6 Ala. 393; *In re Higgins' Estate*, 156 Cal. 257, 104 Pac. 6; *People v. Davidson*, 2 Cal. App. 100, 83 Pac. 161; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *Parsons v. Utica etc. Mfg. Co.*, 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Stillman v. Thompson*, 80 Conn. 192, 67 Atl. 528; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *White v. Wilmington City R. Co.*, 6 Penne. (Del.) 105, 63 Atl. 931; *Washington Second Nat. Bank v. Averell*, 2 App. Cas. (D. C.) 470, 25 L. R. A. 761; *Funk v. United States*, 16 App. Cas. (D. C.) 478; *Atlanta Consol. St. R. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. 24; *Ashley v. Wilson*, 61 Ga. 297; *Dahms v. Moore*, 110 Ill. App. 223; *Pioneer Fireproof Constr. Co. v. Sandberg*, 98 Ill. App. 36; *Atchison etc. R. Co. v. Alsdarf*, 68 Ill. App. 149; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *Goodwin v. State*, 96 Ind. 550; *Stinehouse v. State*, 47 Ind. 17; *Huggard v. Glucose Sugar R. Co.*, 132 Iowa, 724, 109 N. W. 475; *Evans v. Elwood*, 123 Iowa, 92, 98 N. W. 584; *Names v. Union Ins. Co.*, 104 Iowa, 612, 74 N. W. 14; *Bannon v. P. Bannon Sewer Pipe Co. (Ky.)*,

119 S. W. 1170; *Rudd v. Hanna*, 4 T. B. Mon. (Ky.) 528; *Pike v. Crehore*, 40 Me. 503; *Maryland etc. R. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005; *Fulton v. MacCracken*, 18 Md. 528, 81 Am. Dec. 620; *Ducharme v. Holyoke St. R. Co.*, 203 Mass. 384, 89 N. E. 561; *Goyette v. Keenan*, 196 Mass. 416, 82 N. E. 427; *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747; *Miner v. Connecticut R. Co.*, 153 Mass. 398, 26 N. E. 994; *Pond v. Pond*, 132 Mass. 219; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Van Deusen v. Cathcart*, 43 Mich. 258, 5 N. W. 319; *Junclaus v. Great Northern R. Co.*, 99 Minn. 515, 108 N. W. 1118; *Lovejoy v. Howe*, 55 Minn. 353, 57 N. W. 57; *Jones v. State*, 26 Miss. 247; *Grant v. Hathaway*, 118 Mo. App. 604, 96 S. W. 417; *State v. Newcomb*, 220 Mo. 54, 119 S. W. 405; *State v. Pemberton*, 39 Mont. 530, 104 Pac. 556; *Raapke v. Schmoller etc. Piano Co.*, 82 Neb. 716, 118 N. W. 652; *Cutting v. Baker*, 43 Neb. 470, 61 N. W. 726; *Ferrarais v. Kyle*, 19 Nev. 435, 14 Pac. 529; *Hoxie v. Walker*, 75 N. H. 308, 74 Atl. 183; *Cote v. Grand Trunk R. Co.*, 70 N. H. 620, 49 Atl. 567; *Armitt v. English*, 79 N. J. L. 8, 74 Atl. 130; *Fishman v. Consumers' Brewery Co.*, 78 N. J. L. 300, 73 Atl. 231; *Carhart v. State*, 115 App. Div. 1, 100 N. Y. Supp. 499; *Maimone v. Drydock etc. R. Co.*, 58 App. Div. 383, 68 N. Y. Supp. 1073; *Nelson v. Young*, 91 App. Div.

§ 136 (136). The terms "admissibility" and "relevancy" not synonymous.—From the preceding section the conclusion may be drawn that a fact in a cause has to be both logically and legally relevant. It may be small and unimportant and yet be concerning the cause, and therefore logically relevant but yet not admissible. The maxim, *De minimis non curat lex*, while originally applicable to fractional parts of a day or trifling irregularities, has come to be applied to evidence. "Formerly, if there were a scintilla of evidence in support of a case, the judge was held bound to leave it to the jury. But a course of recent decisions has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."²⁰ When it is said that there is no evidence to go to a jury, it does not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the

457, 87 N. Y. Supp. 69; *People v. Carlin*, 194 N. Y. 448, 87 N. E. 805; *Schuylkill River East Side R. Co. v. Stocker*, 128 Pa. 233, 18 Atl. 399; *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. 54, 20 Atl. 407; *Featherman v. Miller*, 45 Pa. 96; *Hart v. Evans*, 8 Pa. 13; *Williams v. Smith*, 29 R. I. 562, 72 Atl. 1093; *Holden v. Thurber (R. I.)*, 72 Atl. 720; *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366; *Kime v. Bank of Edgemont*, 22 S. D. 630, 119 N. W. 1003; *Davis v. Holy Terror Min. Co.*, 20 S. D. 399, 107 N. W. 374; *Gardner v. State*, 121 Tenn. 684, 120 S. W. 816; *Parks v. Knox (Tex. Civ. App.)*, 130 S. W. 203; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; *Richardson v. Baker*, 83 Vt. 204, 21 Ann. Cas. 1059, 75 Atl. 151; *Belka v.*

Allen, 82 Vt. 456, 74 Atl. 91; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149; *State v. Wilson*, 9 Wash. 16, 36 Pac. 967; *Kavanaugh v. Wausau*, 120 Wis. 611, 98 N. W. 550; *Barney v. Douglass*, 22 Wis. 464; *Moore v. United States*, 150 U. S. 57, 37 L. Ed. 996, 14 Sup. Ct. Rep. 26; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *Goodman v. Simonds*, 20 How. (U. S.) 343, 15 L. Ed. 934; *Johnsonburg etc. Brick Co. v. Yates*, 177 Fed. 389, 101 C. C. A. 553; *Mountain Copper Co. v. Van Buren*, 133 Fed. 1, 66 C. C. A. 151; *Underwood v. Wing*, 4 De Gex, M. & G. 633, 3 Eq. Rep. 794, 1 Jur., N. S., 159, 24 L. J. Ch. 293, 2 Wkly. Rep. 641, 53 Eng. Ch. 496, 43 Eng. Rep. 655; *Peacock v. Cooper*, 27 Ont. App. 128.

²⁰ Broom's Legal Maxims, 109.

fact sought to be proved is established.²¹ The chief object of introducing evidence is to secure a rational entertainment of facts; therefore, facts should not be submitted to the jury unless they are logically relevant to the issues. But it is equally plain that *logical relevancy does not in all cases render proposed testimony admissible*.²² For example, a husband may not testify to the declarations of his wife when she is a party to the suit; and an attorney may not testify to the communications of his client made in confidence. In these and other cases, which might be mentioned, the testimony is excluded, however relevant, by positive rules of law.²³ So it is constant practice for the courts to exclude circumstances which might tend toward proof of the propositions at issue, for the reason that such facts are *too remote* to be given probative effect in courts of justice.²⁴ The difficulty, of course, lies in determining in each case whether the fact offered in evidence has such a natural or necessary connection with the fact to be proved as to be relevant in the legal sense of the term. "Legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and, for reasons of practical convenience, demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant; that is, absolutely essential. The fact, however, that it is logically relevant does not insure admissibility. It must also be legally relevant. A fact which, 'in connection with other facts, renders probable the existence' of a fact in issue, may still be rejected, if, in the opinion of the judge, and under the circumstances of the case, it is considered essentially misleading or too remote."²⁵ The different senses in which the

²¹ Per Maule, J., in *Jewell v. Parr*, 13 Com. B. (76 Eng. Com. L.), 916.

²² See preceding section.

²³ See *post*, §§ 733 et seq. and 748 et seq.

²⁴ See next section.

²⁵ *Best, Ev. (Chamb.)*, § 251; *St. Louis etc. R. Co. v. Savage*, 163 Ala. 55, 50 South. 113; *Wheeler v. Packer*, 4 Conn. 102; *Guenther v. Metropolitan R. Co.*, 23 App. D. C. 493; *Funk v. United States*, 16

term "relevancy" may be, and often is, used are well illustrated in an opinion by Cushing, C. J.: "Although undoubtedly the relevancy of testimony is originally a matter of logic and common-sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called common sense, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy."²⁶ We have gone further than that, for it is not only now as a matter of propriety, but as a well-made and properly enforced rule of law, that legal relevancy is a condition precedent to the admissibility of a fact, and the few cases which of necessity are upon the line which is drawn by the judge's discretion do not affect the cogency of the rule itself. The judicial discretion is, in the majority of cases, wisely and reliably exercised.²⁷

App. D. C. 478; *Harvey v. Chicago* etc. R. Co., 221 Ill. 242, 77 N. E. 569; *Stinehouse v. State*, 47 Ind. 17; *Names v. Union Ins. Co.*, 104 Iowa, 612, 74 N. W. 14; *State v. Bouvy*, 124 La. 1054, 50 South. 849; *Baltimore Chemical Mfg. Co. v. Dobbin*, 23 Md. 210; *Phillips v. Mo*, 91 Minn. 311, 97 N. W. 969; *Hawkins v. James*, 69 Miss. 274, 13 South. 813; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Healey v. Bartlett*, 73 N. H. 110, 6 Ann. Cas. 413, 59 Atl. 617; *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Lamprey v. Donacour*, 58 N.

H. 376; *Hoag v. Wright*, 34 App. Div. 260, 54 N. Y. Supp. 658; *Featherman v. Miller*, 45 Pa. 96; *Lawshe v. State*, 57 Tex. Cr. 32, 121 S. W. 865; *Golden Reward Min. Co. v. Buxton Min. Co.*, 97 Fed. 413, 38 C. C. A. 228; *Moore v. United States*, 150 U. S. 57, 37 L. Ed. 996, 14 Sup. Ct. Rep. 26.

²⁶ *State v. Lapage*, 57 N. H. 245, 288, 24 Am. Rep. 75.

²⁷ Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of error will not interfere with,

§ 137 (137). **Logical connection between fact offered and fact to be proved—Illustrations.**—Perhaps the best method of dealing with this part of the subject fully is to give illustrations of the proper exclusion of testimony for want of that close connection with the fact to be proved, which we have shown to be necessary. Although, as a rule, testimony should be excluded as irrelevant on the ground that it may have but little weight, yet the law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on *remote inferences*.²⁸ Thus the fact that a party was hopelessly insolvent was held inadmissible on the issue whether he had furnished money to pay a certain note. So one's financial condition is irrelevant to the question whether he agreed with a physician that he should not pay unless cured;²⁹ and in an action for money lent, it is irrelevant that the defendant had money in the bank at that time.³⁰ But evidence of the financial

unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter: *Alexander v. United States*, 138 U. S. 353, 34 L. Ed. 954, 11 Sup. Ct. Rep. 353; *Moore v. United States*, 150 U. S. 57, 37 L. Ed. 996, 14 Sup. Ct. Rep. 26; *Golsby v. United States*, 160 U. S. 70, 40 L. Ed. 343, 16 Sup. Ct. Rep. 216.

²⁸ *Xenia Bank v. Stewart*, 114 U. S. 224, 29 L. Ed. 101, 5 Sup. Ct. Rep. 845; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *Durkee v. India*

Ins. Co., 159 Mass. 514, 34 N. E. 1133.

²⁹ *Hollywood v. Reed*, 55 Mich. 308, 21 N. W. 313.

³⁰ *Burke v. Kaley*, 138 Mass. 464. Thus the fact that a third person would pay the plaintiff's claim for the defendant if the plaintiff succeeded in his action was held clearly irrelevant: *Lander v. Persky*, 85 Conn. 429, 83 Atl. 209. So in an action in which a claim to insurance moneys was litigated on the ground that the holder of them was not the wife of the assured, though she was so described in the policy, evidence of the communication of disease from the assured to the plaintiff was excluded as irrelevant: *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573. See, also, *O'Connell v. Mercantile Trust Co.*, 165 Mo. App. 398, 147 S. W. 841, as to irrelevancy of agreement to indemnify a third person in an action for return of money deposited in trust.

ability of the party to make the payments may be relevant as bearing on the question of when payments were to be made.³¹ Where it is the contract that a fixed sum shall be paid for goods or services, it is irrelevant to prove the value or usual price;³² and on a contention as to the proper amount of wages, evidence of the amount of wages received in like employment in other towns in another state is too remote.³³ So evidence of the low price for which goods were sold is too remote to be admissible to disprove the claim of a warranty of quality.³⁴ On the issue whether a certain partner did or did not sign a note sued on by an indorsee, evidence that the partners agreed among themselves that neither should sign such a note is irrelevant, the plaintiff having no knowledge of the agreement.³⁵ Among the more recent cases will be found the following

³¹ *Beckley v. Jarvis*, 55 Vt. 348.

³² *Hamilton v. Frothingham*, 59 Mich. 253, 26 N. W. 486; *Kvammen v. Meridean Mill Co.*, 58 Wis. 399, 17 N. W. 22; *Bright v. Metaire Assn.*, 33 La. Ann. 58; *Board of Commissioners v. O'Connor*, 137 Ind. 622, 35 N. E. 106, 37 N. E. 16. Held otherwise where the evidence was conflicting as to whether a certain price was agreed upon: *Saunders v. Gallagher*, 53 Minn. 422, 55 N. W. 600. See, also, *Locke v. Krant*, 85 Conn. 486, 83 Atl. 626.

³³ *Noyes v. Fitzgerald*, 55 Vt. 49.

³⁴ *Ockershausen v. Durant*, 141 Mass. 338, 5 N. E. 523. But the cost price may be some evidence of value: *Hawyer v. Bell*, 141 N. Y. 140, 36 N. E. 6; so is the selling price: *Sanford v. Peck*, 63 Conn. 486, 27 Atl. 1057.

³⁵ *Bates v. Forecht*, 89 Mo. 121, 1 S. W. 120. Other illustrations where the inference sought to be drawn was too remote: *St. Louis etc. R. Co. v. Savage*, 163 Ala. 55, 50 South. 113; *Swann v. Kidd*, 78 Ala. 173; *Raisin Fertilizer Co. v. J. J. Barrow, Jr.*, 97 Ala. 694, 12 South. 388; *Mem-*

phis & C. R. Co. v. Maples, 63 Ala. 607; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 South. 276; *Phelan v. Dalson*, 14 Ark. 79; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Ellen v. Lewison*, 88 Cal. 253, 26 Pac. 109; *Bristol v. Warner*, 19 Conn. 7; *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44; *Mosely v. Gordon*, 16 Ga. 384; *Morgan v. Jones*, 24 Ga. 155; *Dodson v. McCauley*, 62 Ga. 130; *Williams v. Case*, 79 Ill. 356; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963; *Robinson v. State*, 60 Ind. 26; *Burnett v. Overton*, 67 Ind. 557; *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; *Watson Coal & Min. Co. v. James*, 72 Iowa, 184, 33 N. W. 622; *Sutherland v. Standard Life & Acc. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453; *Louisville etc. R. Co. v. Marriott*, 5 Ky. Law Rep. 932; *Henderson Belt R. Co. v. Stapp*, 14 Ky. Law Rep. 111; *Guerin v. Bagneries*, 13 La. 14; *Pike v. Crehore*, 40 Me. 503; *Rumrill v. Adams*, 57 Me. 565; *Brown v. Frederick J. Quimby Co.*, 204 Mass. 206, 90 N. E. 586; *Commonwealth v. Johnson*,

useful decisions. In an action on an account testimony that defendants had settled suits brought by others in the period covered by the plaintiff's particulars was rightly excluded on the ground that the settlement may have been made merely to avoid litigation and to buy peace.³⁶ Testimony that defendants had not paid other accounts for similar goods supplied is not material, but where the defendants sought to evade liability by evidence that they had no use for the particular kind of goods charged for, evidence that they subsequently bought goods of the same kind was held not too remote to be as a matter of law inadmissible.³⁷ Testimony that a plaintiff's husband had given other electric companies permission to cut trees along their line of communication is not admissible in justification of a company's destruction of them without the plaintiff's authority.³⁸ In a suit by certain persons claiming to be the next of kin of a testator, who, after providing that a person

199 Mass. 55, 85 N. E. 188; Higgins v. McCabe, 126 Mass. 13, 30 Am. Rep. 642; Borden v. Boardman, 157 Mass. 410, 32 N. E. 469; Kellogg v. Thompson, 142 Mass. 76, 6 N. E. 860; Hathaway v. Tinkham, 148 Mass. 85, 19 N. E. 18; Patrick v. Howard, 47 Mich. 40, 10 N. W. 71; Simpson v. Walby, 63 Mich. 439, 30 N. W. 199; Julius King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912; Stoinski v. Pulte, 77 Mich. 322, 43 N. W. 979; Farnham v. Thompson, 32 Minn. 22, 18 N. W. 833; Ryan v. Ryan, 58 Minn. 91, 59 N. W. 974; Mattingly v. Hayden, 1 Mo. 439; Ferraris v. Kyle, 19 Nev. 435, 14 Pac. 529; Hutchins v. Berry, 75 N. H. 416, 75 Atl. 650; Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063; Eldridge v. Atlas S. S. Co., 58 Hun (N. Y.), 96, 11 N. Y. Supp. 468; Bacon v. Hanna, 63 Hun (N. Y.), 625, 17 N. Y. Supp. 430; Ehrehart v. Wood, 71 Hun (N. Y.), 609, 25 N. Y. Supp. 31; Silberman v. Simons, 14 Misc. Rep.

222, 35 N. Y. Supp. 668; Lockhart v. Bell, 86 N. C. 443; Sun Mut. Ins. Co. v. Hock, 8 Ohio C. C. 341; Hutchinson v. Canal Bank, 3 Ohio St. 490; State v. Hembree, 54 Or. 463, 103 Pac. 1008; Reed v. Dickey, 1 Watts (Pa.), 152; Tripner v. Abrahams, 47 Pa. 220; Marsh v. Nordyke & Marmon Co. (Pa.), 15 Atl. 875; Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608; Ballou v. Ballou, 30 R. I. 286, 74 Atl. 1089; Heatherly v. Bridges, 1 Heisk. (Tenn.) 220; Missouri Pac. R. Co. v. Lamothe, 76 Tex. 219, 13 S. W. 194; D. M. Osborne & Co. v. Ayers (Tex. Civ. App.), 32 S. W. 73; Uvalde County v. Oppenheimer, 53 Tex. Civ. App. 137, 115 S. W. 904; Hubbard v. Kelley, 8 W. Va. 46; Harris v. Howard, 56 Vt. 695; Barney v. Douglass, 22 Wis. 464.
³⁶ Cottentin v. Meyer, 80 N. J. L. 52, 76 Atl. 341.

³⁷ Richardson v. L. Baker & Sons, 83 Vt. 204, 75 Atl. 151.

³⁸ Jordan v. Delaware & A. Tel. Co. (Del.), 75 Atl. 1014.

named therein and declared in the will to be the wife of the testator should have a life estate in certain realty, devised the remainder interest in that realty to his next of kin, it was not competent to introduce in evidence a certified transcript from the record of the court of ordinary of proceedings by the person named in the will as his wife to have set apart to her a year's support out of the estate of the testator, and of the judgment allowing and setting apart a year's support in favor of the applicant, to illustrate the question whether or not the applicant was actually the wife of the testator.³⁹ Testimony by a defendant mining company in a suit for polluting a stream that they had an easement established in another action for polluting lands lower down the stream was inadmissible;⁴⁰ and the same has been held with regard to an obstructed alley.⁴¹ A prior action against another carrier for damages to a shipment of horses is inadmissible.⁴² And where in an action on a disputed account the purpose of the testimony was to show that, if the plaintiff's bookkeeper had failed to give proper credit to one customer who had paid his account, such fact would show that he had also failed to give defendant proper credit, it was inadmissible. In addition, it tended to prejudice the testimony of the plaintiff's bookkeeper, who was an important witness for plaintiff, and to impeach his evidence, without laying the proper foundation for such impeachment, and was therefore wholly irrelevant and incom-

³⁹ *Folks v. Lee*, 135 Ga. 179, 69 S. E. 24. The identity of a named person with a certain other person, shown by a transcript from the record of the penitentiary to have served a sentence there, being a material question in the case, the transcript of a record showing the conviction of the former of the offense of which the latter, according to the record of the penitentiary, had been convicted, was admissible as a circumstance to be considered by the jury in passing upon the question of the identity of

the two persons. But the evidence introduced on the trial of the criminal case should have been excluded, and it was error for the court to admit the same over proper objections.

⁴⁰ *Williams v. Haile Gold Min. Co.*, 85 S. C. 1, 66 S. E. 117, 1057 (distinguishing *McDaniel v. Walker*, 46 S. C. 43, 24 S. E. 378).

⁴¹ *Wyatt v. Cely*, 86 S. C. 539, 68 S. E. 657.

⁴² *Gulf etc. R. Co. v. Peacock* (Tex. Civ. App.), 128 S. W. 463.

petent.⁴³ Where certain notes, offered by a party in a suit, were evidence of a separate and distinct transaction between the same parties and threw no light upon the issues in the case, they were properly excluded.⁴⁴ So were expressions of sympathy from fellow-travelers after the plaintiff's expulsion from a railway car.⁴⁵ In personal injury cases, it is ordinarily not competent to show compensation for an injury where it comes from a collateral source wholly independent of the defendant (such as from an insurance company), as illustrating either the circumstances of the accident, for that it has no tendency to do, or for abatement of damages, for such compensation is as to the defendant *res inter alios acta* with which the defendant has no concern; especially where the plaintiff no longer had a questioned or litigated interest in the insurance money. To permit the defendant to go into the plaintiff's original right to it, or to question his good faith in the receipt of it, would have introduced an issue with which the case ought not to have been burdened and beclouded. Evidence of such receipt is therefore held prejudicial error.⁴⁶ Where a sick woman was induced to make over her property to a so-called religious society, she believing she was "consecrating it to the Lord" and would be cured, and afterward charged the defendant society with fraud in obtaining her property, testimony by other members of the society as to their experience at the hands of the defendant and his efforts to get their property was inadmissible.⁴⁷ The testimony of witnesses having no knowledge of the transaction should, of course, be rejected.⁴⁸ Nor is it relevant to ask a witness

⁴³ *McClown v. Wilson*, 92 Ark. 153, 122 S. W. 478. See as to books of account of a bank, *Calvert v. Alvey*, 152 N. C. 610, 136 Am. St. Rep. 847, 68 S. E. 153.

⁴⁴ *White v. Dougherty* (Del.), 76 Atl. 609.

⁴⁵ *Kirk v. Seattle Electric Co.*, 58 Wash. 283, 108 Pac. 604.

⁴⁶ *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 South. 52. See, also, *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415, as to inadmissibility of plaintiff's claim against his physician.

⁴⁷ *Mahler v. Beishline*, 46 Colo. 603, 105 Pac. 874.

⁴⁸ *Chadwick v. Chadwick*, 52 Mich. 545, 18 N. W. 350; *Patrick v. Gra-*

his reason for believing certain facts,⁴⁹ or his understanding based upon a conversation; the substance of the conversation should be given.⁵⁰ Obviously, testimony collateral to the issues which would merely tend to prejudice the jury should be rejected.⁵¹ As where the ownership of a piano was the sole issue involved, testimony sought to be introduced as to the ownership of the homestead property was rightly excluded as clearly immaterial, and tended to introduce into the case a collateral matter not pertinent to the issue in controversy, and too remote to shed any light upon the transaction then being investigated.⁵²

ham, 132 U. S. 627, 33 L. Ed. 460, 10 Sup. Ct. Rep. 194; *Anderson v. Jordan*, 15 S. D. 395, 89 N. W. 1015.

⁴⁹ *McDonald v. Jacobs*, 77 Ala. 524. See the late cases, *Musk v. Hall* (R. I.), 82 Atl. 593 (witness' reason for making remark); *Wilkins v. Detroit United R. Co.*, 169 Mich. 437, 135 N. W. 350 (whether witness wanted known that earning capacity less through injury in respect of which action brought).

⁵⁰ *Grubey v. National Bank of Ill.*, 35 Ill. App. 354.

⁵¹ *Galveston Ry. Co. v. Smith* (Tex. Civ. App.), 24 S. W. 668; *Russell v. Hearne*, 113 N. C. 361; *Tijerina v. State*, 45 Tex. Cr. 182, 74 S. W. 913.

⁵² *Bailey v. Walton*, 24 S. D. 118, 123 N. W. 701. Other late cases illustrating the inadmissibility and rejection of such testimony are: *Werten v. Kaosa & Co.*, 169 Ala. 258, 53 South. 98; *Penton v. Williams*, 163 Ala. 603, 51 South. 35; *Central Arkansas & E. R. Co. v. Goelzer*, 92 Ark. 569, 123 S. W. 781; *St. Louis etc. R. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786; *Connor v. Hodges*, 7 Ga. App. 153, 66 S. E. 546; *Folks v. Lee*, 135 Ga. 179, 69 S. E. 24; *Jenkins v. Southern Bell Tel. & T. Co.*, 7 Ga. App. 484, 67 S. E. 124; *Guianios v. De Camp Coal*

Min. Co., 147 Ill. App. 243; *Haywood v. Dering Coal Co.*, 145 Ill. App. 506; *West Skokie Drainage Dist. v. Dawson*, 243 Ill. 175, 17 Ann. Cas. 776, 90 N. E. 377; *Smith v. Cleveland etc. R. Co.*, 149 Ill. App. 348; *O'Dell v. Vandalia R. Co.*, 149 Ill. App. 610; *Pethtel v. Pethtel*, 45 Ind. App. 664, 90 N. E. 102; *Speer v. Speer*, 146 Iowa, 6, 140 Am. St. Rep. 268, 123 N. W. 176; *Knapp v. Brotherhood of American Yeoman*, 149 Iowa, 137, 126 N. W. 336; *Tretter v. Chicago G. W. R. Co.*, 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 339; *Ellis v. Felt*, 206 Mass. 472, 92 N. E. 702; *Payne v. Springfield St. R. Co.*, 203 Mass. 425, 89 N. E. 536; *Ruttle v. Foss*, 161 Mich. 132, 17 Det. Leg. N. 258, 125 N. W. 790; *Sveiven v. Thompson*, 110 Minn. 484, 126 N. W. 131; *Pitman v. Ball*, 140 Mo. App. 389, 124 S. W. 1082; *Seibel-Suessdorf Copper & Iron Mfg. Co. v. Manufacturers' R. Co. (Mo.)*, 130 S. W. 288; *Steltemeier v. Barrett*, 145 Mo. App. 534, 122 S. W. 1095; *Green v. Kansas City S. R. Co.*, 142 Mo. App. 67, 125 S. W. 865; *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049; *Sutton v. Bell*, 79 N. J. L. 507, 77 Atl. 42; *In re Simmons*, 68 Misc. Rep. 65, 124 N. Y. Supp. 744; *Ely v. Russell*, 135 App. Div. 303, 119

§ 137a (137). **Same—Introductory testimony.**—It would be practically impossible, in the conduct of an action, to plunge direct *in medias res*, and judge and jury alike seek for some introductory evidence, just as one hearing only the main incident of a story desires to know the circumstances leading up to it and the results that flow from it. Those circumstances in relation to an action or suit may not *per se* be relevant, but in connection with the main issues to be put before the tribunal, they are treated as the introduction to the main matters or by way of inducement to it. They take the place of the preamble to a statute, which, while it has no power in itself, combined with the enacting clauses becomes the statute. The variety of these introductory or preliminary proofs, as great in number as the variety of causes of action, prevents any attempt at classification, but the rule as to their relevancy is abundantly established.⁵³ One illustration will suffice to convey

N. Y. Supp. 916; *Almy v. Hammer*, 121 N. Y. Supp. 339; *Indian Land & Trust Co. v. Clement*, 22 Okl. 40, 109 Pac. 1089; *Swank v. Elwert*, 55 Or. 487, 105 Pac. 901; *Smith v. Dreyer*, 228 Pa. 438, 77 Atl. 628; *Trexler v. Africa*, 42 Pa. Super. Ct. 542; *Byrne v. Elfreth*, 41 Pa. Super. Ct. 572; *Ackerman v. Atlantic Coast Line R. Co.*, 83 S. C. 278, 65 S. E. 265; *Sullivan v. Charleston & W. C. R. Co.*, 85 S. C. 532, 67 S. E. 905; *Comeau v. Hurley*, 24 S. D. 275, 123 N. W. 715; *Cox v. Steed* (Tex. Civ. App.), 131 S. W. 246; *Galveston etc. R. Co. v. Giles* (Tex. Civ. App.), 126 S. W. 282; *Chicago etc. R. Co. v. Rogers* (Tex. Civ. App.), 129 S. W. 1155; *Erp v. Raywood Canal & Milling Co.* (Tex. Civ. App.), 130 S. W. 897; *State v. Silver King Consol. Min. Co.*, 37 Utah, 62, 106 Pac. 520; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496; *Masner v. Atchison etc. R. Co.*, 177 Fed. 618, 101 C. C. A. 244; *Demp-*

ster v. Cochran, 174 Fed. 587, 98 C. C. A. 433; *Quinalty v. Temple*, 176 Fed. 67, 99 C. C. A. 375.

⁵³ *Griel v. Lomax*, 86 Ala. 132, 5 South. 325; *Miller v. Boykin*, 70 Ala. 469; *David v. David*, 66 Ala. 139; *Yarbrough v. Arnold*, 20 Ark. 592; *West Coast Lumb. Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Hunt v. Swyney* (Cal.), 33 Pac. 854; *Quintard v. Corcoran*, 50 Conn. 34; *Second Nat. Bank v. Averell*, 2 App. D. C. 470; *Atlantic C. L. R. Co. v. Partidge*, 58 Fla. 153, 50 South. 634; *Walker v. Mitchell*, 41 Ga. 102; *Greer v. Caldwell*, 14 Ga. 207, 58 Am. Dec. 553; *Bates v. Ball*, 72 Ill. 108; *Harris v. Miner*, 28 Ill. 135; *Cook v. Woodruff*, 97 Ind. 134; *Miller v. Louisville etc. R. Co.*, 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; *Furlong v. North British etc. Ins. Co.*, 136 Iowa, 468, 113 N. W. 1084; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770; *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St.

the meaning. An action was commenced by one Hunt, executor of the will of Sharp, against defendant Swyney to compel him to convey certain lands alleged to have been held in trust for plaintiff's testator and setting out the facts relied on. Mrs. Sharp, the widow, intervened, claiming that defendant held the land in trust for her, and claiming the rents and profits, setting out that defendant, who was her deceased husband's law clerk, had bought the land referred to at a foreclosure sale (one Rising being the mortgagor) with her money and for her. Upon direct examination Mrs. Sharp was asked: "During the year 1881, from December 1st down to and including the month of October, 1882, was Mr. Swyney, the defendant in this action, your agent in collecting rents for you?" Objection was made that it was immaterial, irrelevant and incompetent, and not pertinent to any of the issues. The objection was overruled, upon the ground that it was introductory. The specifications did not show that any motion was afterward made to strike out, while the record showed that defendant's accounts were put in evidence, showing not only that large amounts of rents were collected by the defendant for her, thus tending to show that she had moneys of her own, but also showing, among other things, that in his ac-

Rep. 287, 62 N. W. 28; Rollins v. Bartlett, 21 Me. 565; Goodhand v. Benton, 6 Gill & J. (Md.) 481; Hughes v. Gross, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031; McDonald v. Inhabitants of Savoy, 110 Mass. 49; Dupuis v. Interior Constr. Co., 88 Mich. 103, 50 N. W. 103; Hitchcock v. Burgett, 38 Mich. 507; Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275; Krech v. Pacific R. Co., 64 Mo. 172; Ritter v. Springfield First Nat. Bank, 30 Mo. App. 652; Schuchman v. Winterbottom, 9 N. Y. Supp. 733, 58 N. Y. Super. 105, 31 N. Y. St. 184; affirmed, 130 N. Y. 699, 30 N. E. 63; Mason v. Raplee, 66 Barb.

(N. Y.) 180; Braswell v. Gay, 75 N. C. 515; Stinson v. Porter, 12 Or. 444, 8 Pac. 454; Porter v. Nelson, 121 Pa. 628, 15 Atl. 852; Harger v. Thomas, 44 Pa. 128, 84 Am. Dec. 422; Selfridge v. Northampton Bank, 8 Watts & S. (Pa.) 320; Walker v. Wilmington C. & A. R. Co., 26 S. C. 80, 1 S. E. 366; Tachini v. State, 59 Tex. Cr. 55, 126 S. W. 1139; Booth v. Upshur, 26 Tex. 64; Neill v. Keese, 5 Tex. 23, 51 Am. Dec. 746; Town of Cavendish v. Troy, 41 Vt. 99; Goodnow v. Parsons, 36 Vt. 46; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102; Sullivan v. Myers, 28 W. Va. 375; Beckwith v. Thompson, 63 Fed. 232, 11 C. C. A. 149.

counts to her of rents collected he charged her for the notary's fee for acknowledging the assignment of the Rising mortgage to himself, and for recording it, for paying the taxes on the mortgage, and for all the expenses of foreclosure of that mortgage, including a witness fee to himself and the expenses of sale. In view of this evidence the preliminary question leading to its introduction was held entirely proper.⁵⁴ The appellate court—applying the familiar rule that it will make all reasonable intendments in favor of the ruling of the court below—will assume (the record being silent on the subject) that all the preliminary facts appeared, or at least that there was evidence tending to establish them, so far as the same were necessary to make the evidence admissible.⁵⁵

§ 137b (137). **Same—Elucidative testimony.**—It follows that if introductory testimony, not inherently relevant, is admissible, as we have shown, *a fortiori* that should be relevant, which will explain, illustrate, or elucidate evidence already given. Indeed, it is now an every-day occurrence for such evidence to be received as relevant—evidence which, if considered abstractly and apart from other evidence, would amount to nothing, but taken in connection with other facts proven in the case, tends to explain and illustrate them, either by way of reinforcing the evidence of the one side, or breaking the force of that given by the other by showing its misapplication, exaggeration or other reason for depreciation of its force value. Thus an explanation of words used in a conversation, the demonstration of the use of a scientific instrument, testimony showing the conduct of a party bears a different construction from that he would have put upon it, a conversation which would otherwise be hearsay, are examples of the class of evidence referred to. A physician sued a railroad company for services rendered to an injured employee, and the plaintiff testified

⁵⁴ Hunt v. Swyney (Sharp, Intervener) (Cal.), 33 Pac. 854.

⁵⁵ Bristol Mfg. Co. v. Palmer, 82 Vt. 438, 74 Atl. 76.

that he had performed certain services for the defendant and had rendered to it bills for the same, which the defendant paid. Afterward the defendant produced one of the bills, which was made out to one Walter Chase, and not to the railroad company. The court, against the defendant's objection, permitted the plaintiff to explain that the bill was not made out by him, but had been so erroneously made out without his knowledge by his assistant, and it was clearly within the discretion of the court to allow the plaintiff to explain the apparent discrepancy between his testimony and the bill produced by the defendant.⁵⁶ So where the plaintiff was notified to produce at the trial certain duebills in question, but he did not do so, claiming they were destroyed after goods had been obtained on them, and that no record was kept showing when they were traded out or destroyed, against a general objection the plaintiff was permitted to show that it was the custom at his store to destroy these duebills after they had been traded out. The evidence was legitimate, as tending to account for their nonproduction.⁵⁷ Where the United States sought damages against the defendant for cutting timber on public lands and introduced an affidavit as a declaration by him of its value, the defendant was entitled to give in explanation the purpose for which the affidavit was made and the circumstances. The court said: "The affidavit could be employed by the prosecution only as a statement made *in pais* by the defendant. It had no greater force than a verbal or written admission, which is by no means conclusive on the party. He may explain the circumstances under which it was made, if for its impeachment or explanation, and as to whether the party who reduced his statement to writing embraced therein all he said. He may give in evidence all he said, as a part of the *res gestae*, if it be pertinent and explanatory."⁵⁸ But testimony by one witness in explanation of the

⁵⁶ Hall v. New York N. H. & H. R. Co., 27 R. I. 525, 65 Atl. 278.

⁵⁷ Ware v. Childs, 82 Vt. 359, 73 Atl. 994.

⁵⁸ Greenleaf on Evidence, 16th ed., vol. 1, par. 201a, p. 336, states the rule as follows: "The party against whom the admission is offered may

evidence of another taken on deposition and read at the trial has been properly held not to be relevant. The deponent should have been asked the questions when he was making the deposition.⁵⁹ A volume might be filled with illustrations of the relevancy of explanatory testimony, but the instances given illustrate the principle, and numerous other cases are appended in the notes.⁶⁰

also explain it away, so far as possible, in any other way—as, by showing that it was said with a different intent or meaning, or without personal knowledge, or the like.” See, also, *Adkins v. Hershy*, 14 Ark. 442; *Stone v. Cook*, 79 Ill. 424-429. The fact that the admission is in the form of an affidavit does not conclude the party from explaining or contradicting it: *Chicago, B. & Q. R. Co. v. Bartlett*, 20 Ill. App. 96, 104; *Yale v. Edgerton*, 14 Minn. (Gil. 144), 194, 204; *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Sharp v. Swayne*, 1 Penne. (Del.) 210, 40 Atl. 113, 115.

⁵⁹ *Warren v. Wallis, Landes & Co.*, 42 Tex. 472.

⁶⁰ *Pollack v. Gunter*, 162 Ala. 317, 50 South. 155; *Fowler v. State*, 155 Ala. 21, 45 South. 913; *Holman v. Clark*, 148 Ala. 286, 41 South. 765; *Wallace v. North Alabama Traction Co.*, 145 Ala. 682, 40 South. 89; *Kimie v. San Jose-Los Gatos etc. R. Co.*, 156 Cal. 379, 104 Pac. 936; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30; *Head v. Selleck*, 76 Conn. 706, 57 Atl. 281; *Barnum v. Barnum*, 9 Conn. 242; *Atlantic Coast Line R. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622; *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48; *Vollmer C. Co. v.*

Rogers, 13 Idaho, 564, 92 Pac. 579; *Chicago etc. Traction Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868; *Overtoom v. Chicago & E. I. R. Co.*, 181 Ill. 323, 54 N. E. 898; *Hayward v. Scott*, 114 Ill. App. 531; *Buckeye Mfg. Co. v. Wooley Foundry & Mach. Wks.*, 26 Ind. App. 7, 58 N. E. 1069; *Gray v. Chicago etc. R. Co.*, 143 Iowa, 268, 121 N. W. 1097; *Graves v. Merchants' & B. Ins. Co.*, 82 Iowa, 637, 31 Am. St. Rep. 507, 49 N. W. 65; *Schuster, Tootle & Co. v. Stout & Wingert*, 30 Kan. 529, 2 Pac. 642; *Collier v. Blake*, 14 Kan. 250; *Grimes v. Talbot*, 1 A. K. Marsh. (Ky.) 205; *State v. Lively*, 119 La. 363, 44 South. 128; *Philbin v. Thurn*, 103 Md. 342, 63 Atl. 571; *Cross v. Iler*, 103 Md. 592, 64 Atl. 33; *Ahearn v. Boston Elevated R. Co.*, 194 Mass. 350, 80 N. E. 217; *Hughes v. Gross*, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031; *Florence Sew. Mach. Co. v. Grover & Baker Sewing Mach. Co.*, 110 Mass. 70, 14 Am. Rep. 579; *Churchill v. Mace*, 148 Mich. 456, 111 N. W. 1034; *Davis v. Teachout*, 126 Mich. 135, 86 Am. St. Rep. 531, 85 N. W. 475; *Baker v. Pulitzer Pub. Co.*, 103 Mo. App. 54, 77 S. W. 585; *Hill Bros. v. Seneca Bank*, 100 Mo. App. 230, 73 S. W. 307; *Trenton Pass R. Co. v. Cooper*, 60 N. J. L. 219, 64 Am. St. Rep. 592, 38 L. R. A. 637, 37 Atl. 730; *Hoxie v. Walker*, 75 N. H. 308, 74 Atl. 183; *Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049; *Whitcher v. Boston & M. R. Co.*, 70

§ 137c (137). **Same—Auxiliary testimony.**—A party to a cause produces, as a rule, all the testimony in his control to establish his case. Only a portion of that testimony generally is directed to the main issue, while the remainder is used perhaps part to succor the principal facts and part to lessen the effect of the opponent's case. To a certain extent this class of testimony is kin to that which is explanatory, and the same rules as to its relevancy apply. To support the plaintiff's *bona fides*, to expose the defendant's *mala fides*, both affirmatively and negatively, is the function of this auxiliary testimony.⁶¹ Illustrations will be found

N. H. 242, 46 Atl. 740; Burr v. Koster, 144 App. Div. 31, 128 N. Y. Supp. 794; Woodrick v. Woodrick, 141 N. Y. 457, 36 N. E. 395; Lewy v. Blumenthal, 83 App. Div. 8, 82 N. Y. Supp. 344; Fraley v. Fraley, 150 N. C. 501, 64 S. E. 381; State v. Harrison, 145 N. C. 408, 59 S. E. 867; Allen v. Willard, 57 Pa. 374; Thommon v. Kalbach, 12 Serg. & R. (Pa.) 238; Hall v. New York etc. R. Co., 27 R. I. 525, 65 Atl. 278; Wilson v. Moss, 79 S. C. 120, 60 S. E. 313; Cain v. Atlantic etc. R. Co., 74 S. C. 89, 54 S. E. 244; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917; Reynolds v. Hinrichs, 16 S. D. 602, 94 N. W. 694; Morton v. State, 91 Tenn. 437, 19 S. W. 225; Robertson v. Brothers (Tex. Civ. App.), 139 S. W. 657; Henderson v. Lumber Co. (Tex. Civ. App.), 128 S. W. 671; Robertson v. Warren, 45 Tex. Civ. 584, 100 S. W. 805; San Antonio T. Co. v. Haines, 45 Tex. Civ. 289, 100 S. W. 788; Oates v. State, 51 Tex. Cr. 449, 103 S. W. 859; Walker v. Skliris, 34 Utah, 353, 98 Pac. 114; Ide v. Boston etc. R. Co., 83 Vt. 66, 74 Atl. 401; Ware v. Childs, 82 Vt. 359, 73 Atl. 994; Sheldon v. Wright, 80 Vt. 298, 67 Atl. 807; Parsons v. Harper, 16 Gratt. (Va.) 64; Tibbals v. Ifland, 10 Wash. 451, 39 Pac. 102;

Sullivan v. Myers, 28 W. Va. 375; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 N. W. 550; Yeska v. Swendrzynski, 133 Wis. 475, 113 N. W. 959; Crawford v. United States, 212 U. S. 183, 53 L. Ed. 465, 29 Sup. Ct. Rep. 260; Burley v. German-American Bank, 111 U. S. 216, 28 L. Ed. 406, 4 Sup. Ct. Rep. 341; Marshall v. Baltimore & O. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953; Morgan v. United States, 169 Fed. 242, 94 C. C. A. 513; Kerbaugh v. Caldwell, 151 Fed. 194, 10 Ann. Cas. 453, 80 C. C. A. 470; United States v. Lumsden, 1 Bond, 5, 26 Fed. Cas. No. 15,641; Crane & Co. v. Fry, 126 Fed. 278, 61 C. C. A. 260; Southern Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416.

⁶¹ Dougherty v. White (Del.), 80 Atl. 237; Richmond & D. R. Co. v. Garner, 91 Ga. 27, 16 S. E. 110; Schuster, Tootle & Co. v. Stout & Wingert, 30 Kan. 529, 2 Pac. 642; Divers v. Fulton, 8 Gill & J. (Md.) 202; Humphrey v. Monida etc. Stage Co., 115 Minn. 180, 131 N. W. 498; Schwerin v. De Graff, 21 Minn. 354; Charlton v. St. Louis etc. R. Co., 200 Mo. 413, 98 S. W. 529; Jones v. Club, 122 Mo. App. 113, 98 S. W. 82; Gehlert v. Quinn, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168; Lan-

in the cases noted of reasons for not calling witnesses in or out of the state, as to the state of mind or health of the witness, reasons for not producing books or documents, allegations of attempted interference with witnesses,⁶² of

dis v. Watts, 82 Neb. 359, 117 N. W. 705; Chamberlain v. Chamberlain Banking House, 4 Neb. (Unof.) 278, 93 N. W. 1021; Shepherd v. Lincoln Traction Co., 79 Neb. 834, 113 N. W. 627; Klein v. Bursleson, 138 App. Div. 405, 122 N. Y. Supp. 752; Smitson v. Southern Pacific Co., 37 Or. 74, 60 Pac. 907; Erp v. Raywood Canal etc. Co. (Tex. Civ. App.), 130 S. W. 897; Roscoe etc. Ry. Co. v. Jackson (Tex. Civ. App.), 127 S. W. 872; Texas etc. Ry. Co. v. Malone (Tex. Civ. App.), 88 S. W. 389; Gardner v. State, 56 Tex. Cr. 594, 120 S. W. 895; Green v. Dodge, 79 Vt. 73, 64 Atl. 499; Durgin v. Danville, 47 Vt. 95; Cross v. Willard, 46 Vt. 73; Thomas v. Lewis, 89 Va. 1, 37 Am. St. Rep. 848, 18 L. R. A. 170, 15 S. E. 389; Kavanaugh v. Wausau, 120 Wis. 611, 98 N. W. 550; Southern Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416.

⁶² Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 21; Miller v. Jones, 32 Ark. 337; Merwin v. Ward, 15 Conn. 377; Mason v. Macon etc. Light Co., 123 Ga. 773, 51 S. E. 569; Richmond etc. R. Co. v. Garner, 91 Ga. 27, 16 S. E. 110; Savannah, F. & W. R. Co. v. Gray, 77 Ga. 440, 3 S. E. 158; Lyons v. Lawrence, 12 Ill. App. 531; Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29; Winchell v. Edwards, 57 Ill. 41; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Benjamin v. Ellinger, 80 Ky. 472; Moon v. Story, 8 Dana (Ky.), 226; Crescent City Ice Co. v. Ermann, 36 La. Ann. 841; Penobscot Boom Corp. v. Brown, 16 Me. 237; Learned v. Hall, 133 Mass. 417; Hastings v. Stetson, 130 Mass. 76;

McDonough v. O'Niel, 113 Mass. 92; Hanson v. Carlton, 6 Allen (Mass.), 276; Commonwealth v. Webster, 5 Cush. (Mass.) 316, 52 Am. Dec. 711; Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638; Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176; Cole v. Lake Shore & M. S. R. Co., 81 Mich. 156, 45 N. W. 983; Wallace v. Harris, 32 Mich. 380; State v. Chamberlain, 89 Mo. 129, 1 S. W. 145; Van Ness v. Van Ness, 32 N. J. Eq. 669; Jones v. Knauss, 31 N. J. Eq. 609; State v. Knapp, 45 N. H. 148; Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; People v. Hovey, 92 N. Y. 554; Bleecker v. Johnston, 69 N. Y. 309; Pease v. Smith, 61 N. Y. 477; Donohue v. People, 56 N. Y. 208; Stafford v. Morning Journal Assn., 68 Hun, 467, 22 N. Y. Supp. 1008; McGuire v. Broadway etc. R. Co., 62 Hun, 623, 16 N. Y. Supp. 922; Brown v. Schock, 77 Pa. 471; Frick v. Barbour, 64 Pa. 120; Danner v. South Carolina R. Co., 4 Rich. (S. C.) 329, 55 Am. Dec. 678; Weatherford etc. R. Co. v. Duncan, 88 Tex. 611, 32 S. W. 878; Durgin v. Danville, 47 Vt. 95; Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73; The Steam Propeller Tillie, 7 Ben. (U. S.) 382, Fed. Cas. No. 14,048; Clifton v. United States, 4 How. (U. S.) 242, 11 L. Ed. 957; Southern Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416; Moriarty v. London, C. & D. R. Co., L. R. 5 Q. B. 314; Attorney General v. Queen's Free Chapel, 24 Beav. 679, 53 Eng. Reprint, 520; Attorney General v.

refusal to permit inspection or examination, of failure to present claims or the presentation of a different claim from that sued upon, and generally on the credibility of witnesses and affecting the weight of their testimony.⁶³ This admission of ancillary testimony is by no means an innovation, and it can readily be appreciated that, like the pawns in a game of chess, it plays very often the most important part in a trial. The court watches with a vigilant eye the proffered testimony, on the liberal principle "that the rules of evidence must expand according to the exigencies of society";⁶⁴ and it is well settled that if the evidence offered conduces in any reasonable degree to establish the probabil-

Halliday, 26 U. C. Q. B. 397; Lowell v. Todd, 15 U. C. C. P. 306; Briggs v. McBride, 17 N. B. 663; Hunter v. Lauder, 8 U. C. L. J., N. S., 17.

⁶³ Southern R. Co. v. McEntire, 169 Ala. 42, 53 South. 158; Andrews v. State, 159 Ala. 14, 48 South. 858; McBryde v. State, 156 Ala. 44, 47 South. 302; Cross v. State, 147 Ala. 125, 41 South. 875; Tifton etc. R. Co. v. Butler, 4 Ga. App. 191, 60 S. E. 1087; Lyons v. Lawrence, 12 Ill. App. 531; Stolp v. Blair, 68 Ill. 541; McGuire v. County, 133 Iowa, 636, 111 N. W. 34; Noble v. White, 103 Iowa, 352, 72 N. W. 556; Fordsville Bkg. Co. v. Thompson, 23 Ky. Law Rep. 1276, 65 S. W. 6; Baker v. Commonwealth, 13 Ky. Law Rep. 571, 17 S. W. 625; Commonwealth v. Tolliver, 119 Mass. 312; Egan v. Bowker, 5 Allen (Mass.), 449; Webster v. Sibley, 72 Mich. 630, 40 N. W. 772; Peters v. Schultz, 107 Minn. 29, 119 N. W. 385; Glassberg v. Olson, 89 Minn. 195, 94 N. W. 554; State v. Duncan, 116 Mo. 288, 22 S. W. 699; State v. Marshall, 115 Mo. 383, 22 S. W. 452; Shepherd v. Lincoln Traction Co., 79 Neb. 834, 113 N. W. 627; Chamberlain v. Chamberlain Banking House, 4 Neb. (Unof.) 278, 93 N.

W. 1021; Flanigan v. Guggenheim Smelt. Co., 63 N. J. L. 647, 44 Atl. 762; Reagan v. Manchester St. R., 72 N. H. 298, 56 Atl. 314; State v. Palmer, 65 N. H. 216, 20 Atl. 6; Ryan v. People, 79 N. Y. 593; McCarthy v. Gallagher, 4 Misc. Rep. 188, 23 N. Y. Supp. 884; Johnson v. Carley, 53 How. Pr. (N. Y.) 326; State v. Whitson, 111 N. C. 695, 16 S. E. 332; Commonwealth v. McMahon, 145 Pa. 413, 22 Atl. 971; Mertz v. Detweiler, 8 Watts & S. (Pa.) 376; McNesse v. Carver, 40 Tex. Civ. App. 129, 89 S. W. 430; Evansich v. Gulf, C. & S. F. R. Co., 61 Tex. 24; Judevine v. Weeks, 57 Vt. 278; Thornton v. Thornton, 39 Vt. 122; Strong v. Slicer, 35 Vt. 40; Kavanaugh v. Wausau, 120 Wis. 611, 98 N. W. 550; Ryan v. State, 83 Wis. 486, 53 N. W. 836; Scott v. United States, 172 U. S. 343, 43 L. Ed. 471, 19 Sup. Ct. Rep. 209; International Harvester Co. v. Voboril, 187 Fed. 973; Chitwood v. United States, 153 Fed. 551, 11 Ann. Cas. 814, 82 C. C. A. 505; Daub v. Northern Pac. R. Co., 18 Fed. 625.

⁶⁴ Lord Ellenborough in *Pritt v. Fairclough*, 3 Camp. 306.

ity of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the nonexistence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measure of redress.⁶⁵

§ 137d (137). **Same—So-called negative testimony.**—Testimony that if a certain event had occurred the witness having those senses ordinarily developed would have seen or heard it is sometimes called negative testimony, more for purposes of identification than because it rests on any logical basis. "If the whistle of the train had been blown I should have heard it," and "If he had struck the defendant while I was with them I should have seen it," are ex-

⁶⁵ *Terry v. Williams*, 148 Ala. 468, 41 South. 804; *Smiley v. Hooper*, 147 Ala. 646, 41 South. 660; *Cook v. Malone*, 128 Ala. 662, 29 South. 653; *Dexter v. Collins*, 21 Colo. 457, 42 Pac. 664; *Collison v. Illinois etc. R. Co.*, 146 Ill. App. 64; *Stolp v. Blair*, 68 Ill. 541; *Stokes v. Sac City*, 151 Iowa, 10, 130 N. W. 786; *Holman v. Raynesford*, 3 Kan. App. 676, 44 Pac. 910; *Hawkins v. James*, 69 Miss. 274, 13 South. 813; *Barrie v. United Rys. Co.*, 138 Mo. App. 557, 119 S. W. 1020; *Mosby v. McKee Commission Co.*, 91 Mo. App. 500; *Landis v. Watts*, 82 Neb. 359, 117 N. W. 705; *Farmers' State Bank v. Yenney*, 73 Neb. 338, 102 N. W. 617; *Chamberlain v. Chamberlain*

Banking House, 4 Neb. (Unof.) 278, 93 N. W. 1021; *People v. Cahill*, 188 N. Y. 623, 81 N. E. 1172; *Dodge v. Weill*, 158 N. Y. 346, 53 N. E. 33; *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007; *Hart v. Newland*, 3 Hawks (10 N. C.), 122; *Van Seiver v. McPherson*, 199 Pa. 331, 49 Atl. 73; *Mertz v. Detweiler*, 8 Watts & S. (Pa.) 376; *Shores v. Southern Ry.*, 72 S. C. 244, 51 S. E. 699; *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14; *Houghton v. Clough*, 30 Vt. 312; *International Harvester Co. v. Voboril*, 187 Fed. 973; *J. S. Toppan Co. v. McLaughlin*, 120 Fed. 705; *Home Insurance Co. v. Weide*, 78 U. S. 438, 20 L. Ed. 197.

amples of the kind of testimony, and have derived their colloquial name by reason of testifying to something that did not occur, and they are merely not required to be put into affirmative form, which would necessitate verbiage and be no clearer. They are invariably held to be relevant.⁶⁶ The rule applies also to cases where entry of the particulars of an accomplished fact would appear in some book or record; proof of the absence of such usual entry is relevant as to the occurrence of the fact.⁶⁷ The absence of entries in

⁶⁶ Rutledge v. Rowland, 161 Ala. 114, 49 South. 463; Andrews v. State, 159 Ala. 14, 48 South. 858; Alabama G. S. R. Co. v. Davis, 119 Ala. 572, 24 South. 862; East Tennessee, V. & G. R. Co. v. Carlross, 77 Ala. 443; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Burch v. Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008; Higgins v. Cherokee R. Co., 73 Ga. 149; Beall v. Beall, 10 Ga. 342; Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756; Treat v. Merchants' L. Assn., 198 Ill. 431, 64 N. E. 992; West Chicago St. R. Co. v. Kennelly, 170 Ill. 508, 48 N. E. 996; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; Louisville etc. R. Co. v. O'Nan (Ky.), 119 S. W. 1192; Vandyke v. Memphis etc. Packet Co., 24 Ky. Law Rep. 1283, 71 S. W. 441; Hannefin v. Blake, 102 Mass. 297; Chambers v. Hill, 34 Mich. 523; Weller v. Wagner, 181 Mo. 151, 79 S. W. 941; Turney v. United Rys. Co., 155 Mo. App. 513, 135 S. W. 93; Foss v. Portsmouth etc. Ry. Co., 73 N. H. 246, 60 Atl. 747; Stone v. Boston etc. R. Co., 72 N. H. 206, 55 Atl. 359; Greany v. Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Bonelle v. Pennsylvania R. Co., 4 N. Y. Supp. 127, 51 Hun. 640; Ratcliffe v. Cary, 4 Abb. Dec. 4, 3 Keyes (N. Y.), 510, 3 Transcr. App. 117; Ed-

wards v. Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730; Corrigan v. Tract Co., 225 Pa. 560, 74 Atl. 420; Holden v. Pennsylvania R. Co., 7 Kulp (Pa.), 52; Lyon v. Marclay, 1 Watts (Pa.), 271; Fluewellian v. State, 59 Tex. Cr. 334, 128 S. W. 621; Galveston etc. Ry. Co. v. Udalle (Tex. Civ. App.), 91 S. W. 330; International etc. Ry. Co. v. Boykin (Tex. Civ. App.), 85 S. W. 1163; Pelly v. Denison & S. R. Co. (Tex. Civ. App.), 78 S. W. 542; Wallace v. Byers, 14 Tex. Civ. App. 574, 38 S. W. 228; Haun v. Rio Grande Western R. Co., 22 Utah, 346, 62 Pac. 908; Comstock v. Jacobs (Vt.), 78 Atl. 1017; Morgan v. Hendricks, 80 Vt. 284, 67 Atl. 702; Schon v. Modern Woodmen etc., 51 Wash. 482, 99 Pac. 25; International Harvester Co. v. Voboril, 187 Fed. 973.

⁶⁷ Wisdom v. Reeves, 110 Ala. 418, 18 South. 13; People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; Santa Rosa City R. Co. v. Central St. R. Co. (Cal.), 38 Pac. 986; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; Knapp v. Day, 4 Colo. App. 21, 34 Pac. 1008; Peck v. Pierce, 63 Conn. 310, 28 Atl. 524; Sumner v. Child, 2 Conn. 607; Parker v. Cleveland, 37 Fla. 39, 19 South. 344; Griffin v. Wise, 115 Ga. 610, 41 S. E. 1003; Schwarze v. Roessler, 40 Ill. App. 474; Hyde v.

books of account cannot, however, be evidence that payments testified to by witnesses were not made. "A false entry would be an act of wrong; an omission to enter might be mere negligence or forgetfulness, with no motive good or bad."⁶⁸ The relevancy of such testimony, moreover, rests upon the inference arising from the method and regularity of business affairs that the entry, if of a fact, would have been made; excepting always such instruments as are ineffective in law unless recorded.⁶⁹

Lookabill, 66 Iowa, 453, 23 N. W. 920; Woods v. Hamilton, 39 Kan. 69, 17 Pac. 335; Marbourg v. McCormick, 23 Kan. 38; Estill v. Patrick, 4 T. B. Mon. (Ky.) 306; Lawhorn v. Carter, 11 Bush (Ky.), 7; Corner v. Pendleton, 8 Md. 337; Mudd v. Turton, 4 Gill (Md.), 233; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.), 448, 77 Am. Dec. 419; Bristol County Sav. Bank v. Keavy, 128 Mass. 298; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Burghardt v. Van Deusen, 4 Allen (Mass.), 374; Morse v. Potter, 4 Gray (Mass.), 292; People v. Kemp, 76 Mich. 410, 43 N. W. 439; Doolittle v. Gavagan, 74 Mich. 11, 41 N. W. 846; Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614; Babcock v. Cobb, 11 Minn. 347; Bullock v. Wallingford, 55 N. H. 619; Pembroke v. Allentown, 41 N. H. 365; Bow v. Allentown, 34 N. H. 351, 69 Am. Dec. 489; Roe v. Nichols, 5 App. Div. 472, 38 N. Y. Supp. 1100; Boor v. Moschell, 55 Hun, 604, 8 N. Y. Supp. 583; Wilson v. Pope, 37 Barb. (N. Y.) 321; Struthers v. Reese, 4 Pa. 129; Keim v. Rush, 5 Watts & S. (Pa.) 377; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; Myers v. Jones, 4 Tex. Civ. App. 330, 23 S. W. 562; Greer v. Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127; McCamant v. Roberts, 80 Tex. 316, 15

S. W. 580, 1054; Edwards v. Barwise, 69 Tex. 84, 6 S. W. 677; Scott v. Bailey, 73 Vt. 49, 50 Atl. 557; Mattocks v. Lyman, 18 Vt. 98, 46 Am. Dec. 138; Hill v. Bellows, 15 Vt. 727; Reed v. Field, 15 Vt. 672; Second Ward Sav. Bank v. Shakman, 30 Wis. 333; Winner v. Bauman, 28 Wis. 563; Woodward v. Chicago M. etc. R. Co., 145 Fed. 577, 75 C. C. A. 591; American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644; Polk v. Wendell, 5 Wheat. (U. S.) 293, 5 L. Ed. 92.

⁶⁸ Schwarze v. Roessler, 40 Ill. App. 474.

⁶⁹ Sumner v. Child, 2 Conn. 607; Parker v. Cleveland, 37 Fla. 39, 19 South. 344; Schwarze v. Roessler, 40 Ill. App. 474; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Shaffer v. McCrackin, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; Hyde v. Lookabill, 66 Iowa, 453, 23 N. W. 920; Lawhorn v. Carter, 11 Bush (Ky.), 7; Estill v. Patrick, 4 T. B. Mon. (Ky.) 306; Corner v. Pendleton, 8 Md. 337; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.), 448, 77 Am. Dec. 419; Morse v. Potter, 4 Gray (Mass.), 292; Burghardt v. Van Deusen, 4 Allen (Mass.), 374; Roe v. Nichols, 5 App. Div. 472, 38 N. Y. Supp. 1100; Boor v. Moschell, 55 Hun, 604, 8 N. Y. Supp. 583; Wilson v.

§ 138 (138).—**Same—Illustrations of relevant facts.**—It has been demonstrated that testimony, obviously collateral to the issues, which would merely tend to prejudice the jury, must be rejected; but where there is such logical connection between the fact offered as evidence and the issuable fact, that proof of the former *tends* to make the latter more probable or improbable, the testimony proposed is relevant, if not too remote. “The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a *slight degree*, to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth.”⁷⁰ Where there is a conflict of testimony of witnesses, evidence is admissible of collateral facts which have a direct tendency to show that the testimony of one set of witnesses is more probable than that of the other.⁷¹ Likewise when the evidence is evenly balanced, evidence of collateral facts is admissible for the same reason.⁷² Among the *general rules* given by Stephen for determining relevancy is the following: “When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it or by the

Pope, 37 Barb. (N. Y.) 321; Keim v. Rush, 5 Watts & S. (Pa.) 377; Scott v. Bailey, 73 Vt. 49, 50 Atl. 557; Mattocks v. Lyman, 18 Vt. 98, 46 Am. Dec. 138; Second Ward Sav. Bank v. Shakman, 30 Wis. 333; Winner v. Bauman, 28 Wis. 563; United States v. Gardiner, 2 Hayw. & H. 89, 25 Fed. Cas. No. 15,186a.

⁷⁰ Holmes v. Goldsmith, 147 U. S. 150, 164, 37 L. Ed. 118, 13 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Baird, 194 U. S. 25, 44,

48 L. Ed. 860, 24 Sup. Ct. Rep. 563; Stevenson v. Stewart, 11 Pa. 307; Wood v. Finson, 91 Me. 280, 39 Atl. 1007; Chamberlain v. Chamberlain Banking House, 4 Neb. (Unof.) 278, 93 N. W. 1021.

⁷¹ Glassberg v. Olson, 89 Minn. 195, 94 N. W. 554; Phillips v. Mo, 91 Minn. 311, 97 N. W. 969.

⁷² Lewis, Cooper & Hancock v. Utah Const. Co., 10 Idaho, 214, 77 Pac. 336.

authority of that person.”⁷³ For this purpose it is often competent to prove the *malice* or state of mind of a party,⁷⁴ his *mode of life*, character or financial condition, when otherwise such testimony would have no bearing upon the issues.⁷⁵ So where a woman brought an action for the value of wheat sown by her husband and assigned to her, and harvested by the defendant, it was error to exclude the circumstances under which the defendant justified, such as the mortgage of the premises and her husband’s obligations to the defendant under an agreement to work the land on shares, and to apply the proceeds after division in payment of the husband’s obligations to the firm of which the defendant was a member. All the facts and circumstances tending to show the relation the husband or the parties sustained to the property were competent and should have been given to the jury.⁷⁶ Equally familiar is the practice of proving, as parts of the chain of evidence, the *opportunity*, preparation, motive, desire or the intention of the party to do the act in question.⁷⁷ On the other

⁷³ Reynolds, Steph. Ev., art. 7; Weaver v. State, 43 Tex. 340, 65 S. W. 534; McKee v. People, 36 N. Y. 113; Kolb v. Whitely, 3 Gill & J. (Md.) 188, 195; Moore v. United States, 150 U. S. 57, 37 L. Ed. 996, 14 Sup. Ct. Rep. 26; Jewell v. Jewell, 1 How. (U. S.) 219, 232, 11 L. Ed. 108; Mitchum v. State, 11 Ga. 615, 621; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

⁷⁴ State v. Gates, 28 Wash. 689, 69 Pac. 385; Sayres v. Commonwealth, 88 Pa. 291; McCue v. Commonwealth, 78 Pa. 185, 21 Am. Rep. 7; State v. Dickson, 78 Mo. 438; State v. Hannett, 54 Vt. 83; Stone v. State, 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630. See note to Keady v. People, 66 L. R. A. 384; Rex v. Clews, 4 Car. & P. 221.

⁷⁵ Commonwealth v. Ferrigan, 44

Pa. 386; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Reinhart v. People, 82 N. Y. 607; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and long note; Commonwealth v. Hudson, 97 Mass. 565; Commonwealth v. Choate, 105 Mass. 451; Long v. Straus, 124 Ind. 84, 24 N. E. 664; Mann v. State, 134 Ala. 1, 32 South. 704.

⁷⁶ Colwell v. Adams, 51 Mich. 491, 16 N. W. 870; In re Higgins’ Estate, 156 Cal. 257, 104 Pac. 6; Bordner v. Depler, 142 Ill. App. 526; Hurst v. Mechlin (Ky.), 119 S. W. 807; Fitch v. Martin, 84 Neb. 745, 122 N. W. 50; Brooks v. Gleason, 113 N. Y. Supp. 122.

⁷⁷ Jewett v. Banning, 21 N. Y. 27; Commonwealth v. Goodwin, 14 Gray (Mass.), 55; Bruner v. Wade, 84 Iowa, 698, 51 N. W. 251; Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251. See § 350 et seq., post.

hand, the party may show that, by reason of physical or mental inability or absence, it is impossible that the act in question should have been his act.⁷⁸ On the same principle it is relevant to prove *misconduct* of the party in respect to the pending case, such as attempting to suppress or to fabricate testimony or bribe witnesses or jurors;⁷⁹ and so it is relevant to prove the *demeanor* of a party accused of a crime or tort,⁸⁰ his flight or concealment and his falsehoods,⁸¹ his attempts to fasten the crime upon others, his possession of property connecting him with the offense,⁸² or statements made in his presence likely to affect his conduct. So "whenever any act may be proved, *statements accompanying and explaining that act* made by or to the person doing it may be proved, if they are necessary to understand it. In criminal cases (of rape) the conduct of the person against whom the offense is said to have been committed, and in particular the fact that (she) made a complaint soon after the offense to persons to whom (she) would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant. When a person's conduct is in issue or is, or is deemed to be, relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected are deemed to be relevant."⁸³

⁷⁸ Moulton v. Aldrich, 28 Kan. 300 (common practice of proving *alibi*).

⁷⁹ Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Hastings v. Stetson, 130 Mass. 76; Chicago City Ry. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29; Donohue v. People, 56 N. Y. 208. See, further, § 17 et seq., *ante*.

⁸⁰ See subject of admissions, § 287 et seq., *post*.

⁸¹ Commonwealth v. Tolliver, 119 Mass. 312; Ryan v. People, 79 N. Y. 593; Murray v. Chase, 134 Mass. 92; Commonwealth v. Goodwin, 14 Gray (Mass.), 55.

⁸² Lindsay v. People, 63 N. Y. 143; Commonwealth v. Parmenter, 101 Mass.

211; Gardiner v. People, 6 Park. Cr. (N. Y.) 157.

⁸³ Reynolds, Steph. Ev., art. 8; Bank v. Kennedy, 17 Wall. (U. S.) 19, 24, 21 L. Ed. 551; Lund v. Tyngsborough, 9 Cush. (Mass.) 36, 41; McDowell v. Goldsmith, 6 Md. 319, 338, 61 Am. Dec. 305; Bragg v. Massie, 38 Ala. 89, 79 Am. Dec. 82; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22, and note; Pinney v. Jones, 64 Conn. 545, 42 Am. St. Rep. 209, 30 Atl. 762; O'Rourke v. Citizens' St. Ry., 103 Tenn. 124, 76 Am. St. Rep. 639, 46 L. R. A. 614, 52 S. W. 872; Baccio v. People, 41 N. Y. 265; State v. Knapp, 45 N. H. 148, 155; Johnson

§ 139 (139). Same, continued.—Facts in issue are those facts upon the truth or existence of which the right or liability to be ascertained in the proceeding depends, and facts relevant to the issue are facts from the existence of which inferences as to the truth or existence of the facts in issue may justly be drawn. The meaning of the word “relevant,” as we have shown, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It is not necessary, however, that it should in itself bear directly upon the point in issue, for, if it be but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant. From these elementary principles it logically follows that to determine the relevancy of evidence, the pleadings of the parties must first be looked to for the purpose of ascertaining the issue. “During the progress of the trial it cannot be told until all the evidence is in what facts alleged will be submitted to the jury; for, when the evidence is closed, an alleged state of facts may be so indisputably and clearly proved or so clearly not proved as to warrant the court in assuming in its charge as a matter of law its existence or nonexistence, as the case may be. But the court’s determining in this manner what issues of fact will under the evidence be submitted to the jury cannot serve as a test for determining the relevancy of evidence introduced or offered upon the trial. Such test can only be the pleadings of parties, for it is from them the issues of fact and of law primarily arise.”⁸⁴ But, although the authorities are agreed on the familiar proposition that the evidence must be confined to the facts put in issue by the pleadings, the rule should not be so arbitrarily or strictly construed

v. State, 17 Ohio, 593; Commonwealth v. McPike, 3 Cush. (Mass.) 181, 184, 50 Am. Dec. 727; Oleson v. State, 11 Neb. 276, 38 Am. Rep. 366, 9 N. W. 38; People v. O’Sullivan, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880;

People v. Shea, 8 Cal. 538; Friend v. Hamill, 34 Md. 298, 308; Knowlton v. Clark, 25 Ind. 391; Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342.

⁸⁴ San Antonio Traction Co. v. Higdon (Tex. Civ. App.), 123 S. W. 732.

as to exclude facts which raise a *reasonable inference* or presumption as to the matter in issue.⁸⁵ When a fact is in a legal sense relevant to the issue, it is not to be excluded, although apparently collateral. Under another head the authorities are cited which show that it may be competent to explain the nature of objects by *experiments* and by comparison with other objects, when preliminary proof is made that the conditions are the same. On the same principle models, maps, photographs and diagrams of objects under investigation, including X-ray photographs, are relevant to the issue where proved to be correct representations.⁸⁶ So it is familiar practice in arriving at the value of lands to receive testimony as to sales of other lands similarly situated;⁸⁷ and when the date of an act is in dispute, it may be fixed by the contemporaneous occurrence of other acts, either notorious or distinctly remembered.⁸⁸ So it is relevant to prove *notoriety* in the neighborhood where the parties reside to lay the foundation for an inference that one of the parties was cognizant of the fact, such knowledge being material.⁸⁹ And it is familiar practice to prove the *condition* of machinery, of a highway or other object, or the condition of health or state of mind at a given time by facts showing such condition at another time when the circumstances are such as to raise a fair inference that no change has taken place.⁹⁰ In like manner when it is alleged

⁸⁵ But there must be proof of the similarity of conditions: *Lake Erie Ry. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *McCormick Co. v. Gray*, 100 Ind. 285.

⁸⁶ See § 411, *post*. See notes to *Chicago etc. R. Co. v. Champion*, 53 Am. St. Rep. 375 (experiments as evidence); *Baustian v. Young*, 75 Am. St. Rep. 468 (photographs); *Spires v. State*, 7 Ann. Cas. 216; *Zancsville etc. R. Co. v. Bolen*, 10 Ann. Cas. 663; *Ausmus v. People*, 19 Ann. Cas. 504. As to X-ray photographs, see cases collected in note to § 581, *post*.

⁸⁷ See § 168, *post*.

⁸⁸ *Ritter v. First Nat. Bank*, 30 Mo. App. 652; *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251; *Rollins v. Clement*, 25 S. C. 601.

⁸⁹ *Kuglar v. Garner*, 74 Ga. 765.

⁹⁰ *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641 (condition of a mill); *Shailer v. Bumstead*, 99 Mass. 112 (state of mind); *Alcott v. Pub. Serv. Corporation*, 78 N. J. L. 482, 138 Am. St. Rep. 619, 32 L. R. A., N. S., 1084, 74 Atl. 499, and note on the admissibility of evidence of condition, before and after accident, of property, the defects in which are alleged to have caused the injury.

that an engine of defendant has caused a fire, evidence is received to show that *other similar engines* owned by the same railroad company have scattered fire near the place in question.⁹¹ Other illustrations of the subject under discussion will be found under appropriate titles in various parts of this work.⁹² It is impossible to lay down any exact test for determining in all cases the question of relevancy. The illustrations already given show the difficulty of defining where probability ceases and mere speculation begins. It is evident that, in the performance of this duty, something must be left to *judicial discretion*. There may be evidence having a slight probative effect, but so unimportant when compared with other better evidence easily available as to be properly excluded. This is especially so when the proposed testimony would unreasonably protract the trial and distract the attention of the jury by the investigation of facts having very slight or remote bearing on the case.⁹³

§ 140 (140). Acts between strangers or between a party and strangers—*Res inter alios acta*.—In its relation to relevancy the maxim, *res inter alios acta alteri nocere non debet*—a transaction between two parties ought not to operate to the disadvantage of a third party—becomes of first importance by reason of its practical utility to prevent a litigant party from being affected by the acts of third parties. The question of relevancy less frequently arises when the offered proof relates to transactions which have transpired directly between the plaintiff and defendant; but it is constantly arising when the effort is made to prove the acts and declarations of strangers or of one of the parties to the action in his dealings with strangers. Such evi-

⁹¹ See §§ 166, 167, *post*.

⁹² Among others see §§ 146, 147, 163, 166, 167, *post*, as to highways, railroad fires, etc. For other cases, see *Harrington v. Keteltas*, 92 N. Y. 40; *Buswell Co. v. Case*, 144 Mass. 350, 11 N. E. 549; *Ayres v. Hubbard*,

57 Mich. 322, 58 Am. Rep. 361, 23 N. W. 829; *Mack v. Leadle*, 78 Iowa, 164, 42 N. W. 636.

⁹³ *Amoskeag Co. v. Head*, 59 N. H. 332; *Temperance Assn. v. Giles*, 33 N. J. L. 260; *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317.

dence, in general, "it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or towards certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man toward other persons."⁹⁴ Broom says: "On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man shall be bound by the acts of mere unauthorized strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him."⁹⁵ The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference; so that, in general, no declaration, written entry, or affidavit made by a stranger, is evidence against a man; nor can a person be affected, still less concluded, by any evidence,⁹⁶ decree, or judgment to which he was not actually, or in consideration of law privy."⁹⁷ Therefore, the well-known rule founded on the maxim is that evidence of transactions with which the party against whom it is offered is not connected is not admissible.⁹⁸ It is a good rule and a sound rule, and none

⁹⁴ 1 Tayl. Ev., 10th ed., § 317.

⁹⁵ 1 Stark, Ev., 3d ed., 58, 59, from which valuable work many of the remarks appended to the above maxim have been extracted. See *Armstrong v. Normandy*, 5 Ex. 409; *Reg. v. Ambergate etc. Ry. Co.*, 1 El. & Bl. (72 C. L. R.) 372, 381, 118 Eng. Reprint, 475; *Salmon v. Webb*, 3 H. L. Cas. 510, 10 Eng. Reprint, 201.

⁹⁶ See *Humphreys v. Pensam*, 1 Mylne & Cr. 580, 40 Eng. Reprint, 498.

⁹⁷ Broom's Legal Maxims, 8th Am. ed., 953.

⁹⁸ *Cleveland etc. Ry. Co. v. Jenkins*, 174 Ill. 398, 66 Am. St. Rep. 296, 62 L. R. A. 922, 51 N. E. 811; *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa, 180, 52 N. W. 181 (an agreement made by a railroad employee with another railroad which did not purport to embody or refer to defendant's rules).

the less good and sound, because it has important exceptions which are equally valuable with the rule itself. Stephen, the greatest English authority on the subject, puts it⁹⁹ that a fact which renders the existence or nonexistence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith in any of the ways already specified, is deemed not to be relevant to such fact except in certain specially excepted cases. He then proceeds to mark the exceptions of acts showing intention and good faith,¹⁰⁰ and of facts showing system both generally and in cases of negligence.¹ The learned English writer in an explanatory note,² after stating that his rule was the substitute for the original maxim already cited, says that the meaning of the rule must be inferred from the exceptions to it stated in his articles 11 and 12, which show that it means, "You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference." The rule, he says, is of very much greater importance and more frequent application than the

⁹⁹ Reynolds, Steph. Dig. Ev., p. 20 et seq., arts. 10-12, and note 6 thereon, being the original digest altered and adapted by Reynolds to American law.

¹⁰⁰ When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is, or is deemed to be, relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely, on the

occasion in question, to act in a similar manner: Reynolds, Steph. Dig. Ev. 21.

¹ When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant. Reynolds has added: "When there is a question whether an accident shown to have happened was caused by the negligence of a defendant, the fact that other accidents of a similar character had previously happened at the same place is deemed to be relevant": Reynolds, Steph. Dig. Ev. 25.

² Reynolds, Steph. Dig. Ev., p. 202, note 6.

exceptions, and is one of the most characteristic and distinctive parts of the English law of evidence, for it is the rule which prevents a man charged with a particular offense from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion.³ American illustrations of the exclusion of this class of evidence abound with varied instances. Thus, where a local railroad agent contracted to ship goods at reduced rates, and his principals repudiated his authority and offered in evidence communications between themselves and another local agent to show that their contracting agent had refused to make such reduction for others, the evidence was excluded, as also was evidence of agreements between the members of an association of railroad companies bearing on the question.⁴ So in an action for failure to construct certain irrigation work on a rice field by reason of which breach the crops failed, the plaintiff was entitled to introduce a witness to testify to the amount and value of crops raised by him in previous years in another county upon land situated some thirty miles distant from that of plaintiff's. It was shown that the lands were practically the same as to character and fertility, and the testimony was admissible to show what the yield on plaintiff's land would probably have been during said years had the pumping plant been such as to have afforded a sufficient supply of water for irrigation.⁵ In action against an officer for storage of property left on

³ The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In the illustrative cases given by Stephen, the evidence admitted went to prove the true char-

acter of facts which, standing alone, might naturally have been accounted for on the supposition of accident—a supposition which was rebutted by the repetition of similar occurrences: *Id.*, pp. 203, 204.

⁴ *Erie and Pacific Despatch v. Cecil*, 112 Ill. 180.

⁵ *Erie City Iron Works v. Noble* (Tex. Civ. App.), 124 S. W. 172.

plaintiffs' premises, evidence of other officers is inadmissible to show that no charge for storage had ever been made to them in similar cases.⁶ Where it was claimed against a guardian that he had not accounted for the profit on stone taken from his ward's farm and crushed thereon, evidence of a witness that he could cart stones from his wall to the crusher with profit was properly excluded as irrelevant.⁷ An action was brought to recover for certain pine timber which, it was claimed, was sold to the defendant and received by him. The evidence of the plaintiffs tended to show that the timber was sold to the defendant individually, by a verbal contract, at so much per thousand feet, and that he got a certain amount; the evidence being that defendant bought all of the pine timber on a certain piece of land, but not showing whether what he got was all of said timber or not. There was no error in sustaining the objection, by the plaintiffs, to the question to the defendant, as a witness, "How much were you getting for cutting and hauling this timber?" The defendant had denied making the purchase on his own account, and had stated that he was merely cutting and hauling the timber for the Limestone Lumber Company. It was immaterial to the issues in such case what he was being paid for that service.⁸ An interesting aspect of the application of the rule is shown in a recent New York decision.⁹ An accused was charged with subornation of perjury. A divorce suit was pending in which the traversable issue of record was whether the husband had committed adultery in Canada in 1905, and the false testimony solicited by accused was designed to show a separate and distinct act of adultery, not referred to in the complaint, committed in New York in 1908. The bare statement of these facts, unrelated both in pleading and in circumstance, is sufficient to draw attention sharply to the

⁶ *Fitchburg R. R. Co. v. Freeman*, 12 Gray (Mass.), 401; 74 Am. Dec. 600.

⁷ *Ballou v. Ballou*, 30 R. I. 286, 74 Atl. 1089.

⁸ *Dees v. Self Bros.*, 165 Ala. 225, 51 South. 735.

⁹ *People v. Teal*, 196 N. Y. 372, 17 Ann. Cas. 1175, 25 L. R. A., N. S., 120, 89 N. E. 1086.

utter irrelevancy, incompetency and immateriality of the false testimony solicited to the issue tendered by the complaint.¹⁰ When the defendant wishes to prove that a *loan* made to him by the plaintiff was for usurious interest, it is irrelevant to show that the plaintiff has been in the habit of making usurious loans to other persons.¹¹ In a case often cited on this subject, the action was between landlord and tenant, and the issue was whether the rent was payable quarterly or half yearly. It was held irrelevant to show in what way *other tenants* paid their rent.¹² In another leading case, where the action was for *goods sold* and delivered, it was held irrelevant for the defendant to show on cross-examination, by way of defense, that the plaintiff had entered into contracts with other persons in a particular form for the purpose of proving that the contract sued on was not as represented by the plaintiff. In this case in discussing the question the learned judge said; "Does the fact of a person having once or many times, in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger; If such evidence were held admissible it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual and therefore that it was

¹⁰ Stevens v. Stevens, 54 Hun, 490, 8 N. Y. Supp. 47; Germond v. Germond, 6 Johns. Ch. 347, 10 Am. Dec. 335; Reg. v. Southwood, 1 Fost. & F. 356.

¹¹ Jackson v. Smith, 7 Cow. (N. Y.) 718; Hartman v. Evans, 38 W. Va.

669, 18 S. E. 810. See Ross v. Ackerman, 46 N. Y. 210. Other contracts are inadmissible to prove the terms of the contract in issue: Walworth v. Barron, 54 Vt. 677.

¹² Carter v. Pryke, 1 Peake, 95.

highly probable that the particular charge of assault was well-founded. The extent to which this sort of thing might be carried is inconceivable."¹³ It is irrelevant to show that the drawer has made *other notes* in a certain way where the issue is the form of the note;¹⁴ or the *quality of goods* sold at the same time where the issue is the good quality of those sold to the plaintiff;¹⁵ or a *failure of consideration* in a similar transaction with other parties, when the defense is an entire failure of consideration;¹⁶ or a similar promise to another similarly situated to plaintiff;¹⁷ or an *assault* by defendant upon another at a different time and place;¹⁸ or an assault to commit rape by defendant against other women;¹⁹ or as to the habit of lying;²⁰ or other *similar frauds* committed by defendant at about the same time.²¹ Other illustrations will be found in a preceding section²² and throughout the work under headings to which they are appropriate in addition to those in the note hereto.²³

¹³ Willes, J., in *Hollingham v. Head*, 4 Com. B., N. S., 391, 93 Eng. Com. L. 388.

¹⁴ *Iron Mt. Bank v. Murdock*, 62 Mo. 70.

¹⁵ *Holcombe v. Hewson*, 2 Camp. 391. See, also, *Harris v. Howard*, 56 Vt. 695; *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18; *Campbell v. Russell*, 139 Mass. 278, 1 N. E. 345.

¹⁶ *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708.

¹⁷ *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725.

¹⁸ *People v. Gibbs*, 93 N. Y. 470.

¹⁹ *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778.

²⁰ *Commonwealth v. Kennon*, 130 Mass. 39.

²¹ *Jordon v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731. See, also, *Ryan v. City of Chicago*, 162 Ill. App. 252, as to evidence of a physician as to necessity of operation; *Merchants' Nat. Bank v. Townsend* (Tex. Civ. App.),

147 S. W. 617, as to evidence that plaintiff consulted lawyer and acted on his advice in action on contract; *Chesterfield Mfg. Co. v. Leota Cotton Mills*, 194 Fed. 358, as to dyeing work done for other persons.

²² § 137, *ante*.

²³ *Scruggs v. Riddle* (Ala.), 54 South. 641; *Pace v. Louisville etc. R. Co.*, 166 Ala. 519, 52 South. 52; *Thweatt v. McCullough*, 84 Ala. 517, 5 Am. St. Rep. 391, 4 South. 399; *Territory v. Yourkee*, 3 Ariz. 346, 29 Pac. 894; *Roach v. Whitfield*, 94 Ark. 448, 140 Am. St. Rep. 131, 127 S. W. 722; *Davis v. Commercial etc. Ins. Co.*, 158 Cal. 766, 112 Pac. 549; *Breuner Co. v. King*, 9 Cal. App. 271, 98 Pac. 1077; *McLean v. Llewellyn Iron Wks.*, 2 Cal. App. 346, 83 Pac. 1082; *Ausmus v. People*, 47 Colo. 167, 19 Ann. Cas. 491, 107 Pac. 204; *Holy Cross Gold Min. etc. Co. v. O'Sullivan*, 27 Colo. 237, 60 Pac. 570; *Smith v. Ford*, 82 Conn. 653, 74 Atl. 910; *Thomas v.*

§ 140a. (140). Acts between the same persons.—It must always be borne in mind, in considering the exceptions to exclusionary rules of evidence, that one of the most im-

Young, 81 Conn. 702, 71 Atl. 1100; Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Augusta N. S. Co. v. Forlaw, 133 Ga. 138, 65 S. E. 370; Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; McMahon v. Chicago etc. R. Co., 239 Ill. 334, 88 N. E. 223; Hobart v. Van Aernam, 146 Ill. App. 1; Pell v. Joliet etc. Ry. Co., 142 Ill. App. 362; Seavey v. Shurick, 110 Ind. 494, 11 N. E. 597; Robertson v. Hamilton, 16 Ind. App. 328, 59 Am. St. Rep. 319, 45 N. E. 46; State v. Rozeboom, 145 Iowa, 620, 124 N. W. 783; Gray v. Chicago etc. R. Co., 143 Iowa, 268, 121 N. W. 1097; Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621; McBride v. Steinweden, 72 Kan. 508, 83 Pac. 822; Watson v. Kentucky etc. Bridge etc. Co., 137 Ky. 619, 126 S. W. 146, 129 S. W. 341; Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 307, 126 S. W. 144; State v. Brady, 124 La. 951, 50 South. 806; Ziegler v. Interior Decorating Co., 116 La. 752, 41 South. 59; Harmon v. Wright, 65 Me. 516; Prentiss v. Roberts, 49 Me. 127; Aetna I. Co. v. Fuller, 111 Md. 321, 73 Atl. 738, 74 Atl. 369; Di Giorgio Co. v. Pennsylvania etc. R. Co., 104 Md. 693, 8 L. R. A., N. S., 108, 65 Atl. 425; Holt v. Holt, 204 Mass. 25, 90 N. E. 392; Commonwealth v. King, 202 Mass. 379, 88 N. E. 454; Ruttle v. Foss, 161 Mich. 132, 125 N. W. 790; Seitz v. Starke, 144 Mich. 448, 108 N. W. 354; State v. Kight, 106 Minn. 371, 119 N. W. 56; Ham v. Wheaton, 61 Minn. 212, 63 N. W. 495; Waldrop v. State, 95 Miss. 287, 48 S. 609; Merchants' Wharf-Boat Assn. v. Smith (Miss.), 3 South. 249; Roos v. Clark, 14 Mo. App. 594; State v. Colvin, 226 Mo. 446, 126 S. W. 448; Prosser v. Mon-

tana Cent. R. Co., 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81; Goodlett v. Trans-Missouri Min. & Dev. Co., 84 Neb. 485, 121 N. W. 444; Lucke v. Yoakum, 25 Neb. 427, 41 N. W. 255; Tonopah & G. R. Co. v. Fel-lanbaum, 32 Nev. 278, 107 Pac. 882; Finkelstein v. Keene etc. R. Co., 75 N. H. 303, 73 Atl. 705; Cole v. Board-man, 63 N. H. 580, 4 Atl. 572; At-lantic City v. New Auditorium Pier Co., 67 N. J. 621, 63 Atl. 169; Roper v. Territory, 7 N. M. 255, 33 Pac. 1014; See v. Wormser, 129 App. Div. 596, 113 N. Y. Supp. 1093; Berrent v. Simpson, 109 N. Y. Supp. 753; Friedman v. Bindseil, 49 Misc. Rep. 639, 97 N. Y. Supp. 995; Hamilton v. Seaboard etc. Ry., 150 N. C. 193, 63 S. E. 730; Johnson v. Atlantic Coast Line R. Co., 140 N. C. 581, 53 S. E. 362; Hoppe v. Parmalee, 20 Ohio C. C. 303, 11 Ohio Cir. Dec. 24; Byers v. Territory, 1 Okl. Cr. 677, 100 Pac. 261, 103 Pac. 532; State v. Osborne, 54 Or. 289, 20 Ann. Cas. 627, 103 Pac. 62; Mahon v. Rankin, 54 Or. 328, 102 Pac. 608, 103 Pac. 53; Floyd v. Kulp Lumber Co., 222 Pac. 257, 71 Atl. 13; Haworth v. Truby, 138 Pa. 222, 20 Atl. 942; Williams v. Haile etc. Min. Co., 85 S. C. 1, 66 S. E. 117, 1057; Rookard v. Atlantic etc. R. Co., 84 S. C. 190, 137 Am. St. Rep. 839, 27 L. R. A., N. S., 435, 65 S. E. 1047; Gard-ner v. State, 121 Tenn. 684, 120 S. W. 816; Stephenson v. Jackson (Tex. Civ. App.), 128 S. W. 1196; Freeman v. Puckett (Tex. Civ. App.), 120 S. W. 514; Figaroa v. State, 58 Tex. Cr. 611, 127 S. W. 193; Neumann v. State, 58 Tex. Cr. 248, 125 S. W. 28; Richardson v. Baker, 83 Vt. 204, 75 Atl. 151; Bristol Mfg. Co. v. Palmer, 82 Vt. 438, 74 Atl. 76; Clinchfield

portant of such rules is that evidence of other acts of the parties, outside of the acts in record and unconnected with it, are not generally admitted in evidence.²⁴ It guards against unfair surprise of the opponent, who could not possibly foresee the extraneous matter that might be introduced,²⁵ and it also prevents the indefinite multiplication of the issues which would lead to a sort of legal chaos, and place it in the power of a litigant to prolong at will the

Coal Co. v. Wheeler, 108 Va. 448, 62 S. E. 269; Murray v. Moore, 104 Va. 707, 52 S. E. 381; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149; Garber-son v. Trans-Continental Freight Co., 51 Wash. 213, 98 Pac. 612; Fink v. Thomas, 66 W. Va. 487, 19 Ann. Cas. 571, 66 S. E. 650; Watts v. State, 5 W. Va. 532; Fisher v. Waupaca etc. Ry. Co., 141 Wis. 515, 124 N. W. 1005; Clark Co. v. Rice, 127 Wis. 451, 7 Ann. Cas. 505, 106 N. W. 231; Kurowski v. State, 143 Wis. 210, 126 N. W. 546; Canada Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 474, 23 L. Ed. 356; Boyd v. United States, 142 U. S. 450, 35 L. Ed. 1077, 12 Sup. Ct. Rep. 292; Chicago v. Greer, 9 Wall. (U. S.) 726, 19 L. Ed. 769; Walker R. & H. Co. v. Merchant Co., 173 Fed. 771, 97 C. C. A. 495; Delaware etc. R. Co. v. Gleason, 159 Fed. 383, 86 C. C. A. 383; Hammerschlag Mfg. Co. v. Struthers-Wells Co., 154 Fed. 326, 83 C. C. A. 198; Seibert Cylinder Oil-cup Co. v. William Powell Co., 38 Fed. 600; Hillyard v. Grand Trunk R. Co., 8 Ont. 583; Loughead v. Collingwood Shipbuilding Co., 16 Ont. L. R. 64; Watts v. Lyons, 13 L. J. C. P. 91, 6 M. & G. 1047, 7 Scott N. R. 1000, 46 Eng. Com. L. 1047; Holcombe v. Hewson, 2 Camp. 391, 11 Rev. Rep. 746; Delamotte v. Lane, 9 Car. & P. 261, 38 Eng. Com. L. 161.

²⁴ Southern R. Co. v. Gullatt, 158 Ala. 502, 48 South. 472; Andrews

v. Tucker, 127 Ala. 602, 29 South. 34; Singleton v. Thomas, 73 Ala. 205; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Denver & R. G. R. Co. v. Glasseott, 4 Colo. 270; Denham v. State, 5 Ga. App. 303, 63 S. E. 62; Haigh v. Lenfesty, 239 Ill. 227, 87 N. E. 962; Kelly v. Dandurand, 28 Ill. App. 25; Ramsey v. Rushville & M. Gravel Road Co., 81 Ind. 394; Eskridge v. Cincinnati etc. R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. Law Rep. 557; Kentucky Cent. R. Co. v. Barrow, 6 Ky. Law Rep. 240; McIntire v. Talbot, 62 Me. 312; Baltimore R. & H. Co. v. Kreiner, 109 Md. 361, 71 Atl. 1066; Barnard v. Bates, 201 Mass. 234, 87 N. E. 472; Durkee v. India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Tuttle v. Fitchburg R. Co., 152 Mass. 42, 25 N. E. 19; Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 125 Mass. 292; Linn v. Gilman, 46 Mich. 628, 10 N. W. 46; Bookman v. New York, 133 App. Div. 242, 117 N. Y. Supp. 197; Whintringham v. Dibble, 66 N. Y. 634; Sheldon v. Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155; Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789; Wiggs v. Southwestern Tel. & Tel. Co. (Tex. Civ. App.), 110 S. W. 179; Ross v. Moskowitz (Tex. Civ. App.), 95 S. W. 86; Whitney v. First Nat. Bank, 55 Vt. 154, 45 Am. Dec. 598.

²⁵ Western Ins. Co. v. Tobin, 32 Ohio St. 77.

action in which he was engaged. The introduction, for instance, of evidence of another offense is inadmissible, because it raises another and different issue which would call for the introduction of other testimony upon such issue, and thus would involve the true and specific issue presented to the jury for its determination, whether the defendant was guilty of the specific crime charged in the indictment.²⁶ It is, nevertheless, always a matter in the discretion of the court to admit or reject the evidence.²⁷ Testimony is sometimes received, however, of other contracts *between the same persons* for the purpose of proving a contract in issue, provided the different contracts were so connected as to illustrate a general plan.²⁸ In cases of implied contracts where circumstantial evidence must perforce be resorted to, it has been held that evidence of similar transactions was relevant. In an action against a corporation, whose business it was to purchase cattle, and which transacted all of its business in the county through its superintendent, to recover the purchase price of cattle sold, where the evidence was conflicting as to whether the purchase was made by the superintendent as actual or ostensible agent for the corporation or for himself individually, evidence is admissible to show that the superintendent of the corporation defendant had made similar purchases of cattle from other persons for the corporation in his own name.²⁹ Where the plaintiff sued defendant for breach of contract in refusing to accept certain castings made by the plaintiff on their order, objection was made to

²⁶ Alabama Lumb. Co. v. Keel, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204; Ware v. State, 91 Ark. 555, 121 S. W. 927; Ackers v. State, 73 Ark. 262, 83 S. W. 909; Allen v. State, 68 Ark. 577, 60 S. W. 956.

²⁷ Mayhew v. Sullivan Min. Co., 76 Me. 100; Bemis v. Temple, 162 Mass. 342, 26 L. R. A. 254, 30 N. E. 970; Barnard v. Bates, 201 Mass. 234, 87 N. E. 472.

²⁸ Livingston v. Stevens, 122 Iowa,

62, 94 N. W. 925; Zane v. Onativio, 139 Cal. 328, 73 Pac. 856; Huntsman v. Nichols, 116 Mass. 521; Wood v. Finson, 91 Me. 280, 39 Atl. 1007; Bank of Nova Scotia v. Robinson, 1 Carl. 326, 26 S. C. R. 387; D'Avignon v. Jones, 23 Occ. N. 71, 9 B. C. R. 359; Kidd v. Henderson, 22 N. S. R. 138.

²⁹ Lake Shore etc. Co. v. Modoc etc. Co., 130 Cal. 669, 63 Pac. 72.

the admission of a letter from defendant to plaintiffs, written on the close of the business between them during the previous season. It expressed entire satisfaction, and was admitted in connection with testimony tending to show that the deliveries were made in the same manner as during the previous season. This was not error.³⁰ An action was brought to enjoin a construction company from paying a residue to partners defendants, who had completed a contract to prepare a section for a railroad. The evidence showed an original agreement of seven partners to complete the section and share the profits equally but also showed that afterward, when one of the partners quit the work and refused to do more, they settled with him on a basis of wages at three dollars per day, less expenses advanced, and it was then agreed between all of the remaining partners, including the plaintiff, that if any other one should quit the work before it was done, he should receive the same *per diem*, less expenses, the evidence as to the settlement with the first quitting partner was properly admitted.³¹ Where a defendant had agreed to pay for goods delivered to another and was sued for those delivered between November 1 and December 19, 1896, and denied the agreement, evidence was introduced that he had paid the September and October accounts of the plaintiff. There was no error in this. It was not an effort to prove a disconnected, and therefore irrelevant, fact of a similar nature. The principal issue in the case was whether or not defendant did agree to pay the bills for the goods furnished. Plaintiff claimed that he did so agree late in August, 1896, and that no other agreement was made until December, 1896, and the fact that he paid the bills for September and October had a tendency to establish such a contract, because parties do not generally pay for goods furnished to third parties unless under some contractual obligation to do so. The matters sought to be shown were in no sense

³⁰ *Stuart v. Home Telephone Co.*,
161 Mich. 123, 125 N. W. 720.

³¹ *Swanson v. Wilsen*, 13 Cal. App.
389, 110 Pac. 336.

collateral.³² But contracts with other persons are rejected as irrelevant, except in exceptional cases.³³

§ 140b (140). Similar transactions in specific instances. It has been repeatedly and truly said that the safest guide to the reception or rejection of evidence of similar transactions is the knowledge of the judge, who applies in that regard common sense aided by precedents and analogous cases. Those cases are illustrative of so many varieties of similar instances that we adopt the method of utilizing some of them for our instruction rather than attempt the framing of any definite enunciation. It will not be presumed, for instance, in considering the vagaries of conduct either in civil or criminal matters, that a man has done a particular act because he did it once before,³⁴ or because

³² Grand Forks Lumber & Coal Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901. See, also, Wood v. Brewer, 73 Ala. 259; Moody v. Tenney, 3 Allen (Mass.), 327; Beasore v. Stevens, 155 Mich. 403, 119 N. W. 431; Dwight v. Brown, 9 Conn. 83; Fleming v. Hill, 65 Ga. 247; Becker v. Gibson, 70 Ind. 239; Hufford v. Neher, 15 Ind. App. 396, 44 N. E. 61.

³³ Roberts v. Dixon, 50 Kan. 436, 31 Pac. 1083; Gill v. Staylor, 97 Md. 665, 55 Atl. 398; Davis v. Kneale, 97 Mich. 72, 56 N. W. 220; McLoghlin v. National etc. Bank, 139 N. Y. 514, 34 N. E. 1095; Thompson v. Exum, 131 N. C. 111, 42 S. E. 543; Jones v. Ellis, 68 Vt. 544, 35 Atl. 488; Kelly v. Schupp, 60 Wis. 76, 18 N. W. 725; Bookman v. City of New York, 133 App. Div. 242, 117 N. Y. Supp. 197.

³⁴ Davis v. Anderson, 163 Ala. 385, 50 South. 1002; Supreme Lodge etc. v. Baker, 163 Ala. 518, 50 South. 958; Hamburg Bank v. George, 92 Ark. 472, 476, 123 S. W. 654; McCown v. Wilson, 92 Ark. 153, 122 S. W. 478; Moody v. Peirano (Cal. App.), 84 Pac. 783; Vestal v. Young, 147 Cal. 721,

82 Pac. 383; Mahler v. Beishline, 46 Colo. 603, 105 Pac. 874; Laufer v. Bridgeport Traction Co., 68 Conn. 475, 37 L. R. A. 533, 37 Atl. 379; Gorham v. Gorham, 41 Conn. 242; Jordan v. Delaware etc. Tel. etc. Co. (Del.), 75 Atl. 1014; Cohen v. Cohen, 2 Mackey (D. C.), 227; Schaffer v. Lehman, 2 McArthur (D. C.), 305; Central of Ga. R. Co. v. Duffey, 116 Ga. 346, 42 S. E. 510; Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; Jewell Filter Co. v. Kirk, 200 Ill. 382, 65 N. E. 698; Diamond Block Coal Co. v. Edmondson, 14 Ind. App. 594, 43 N. E. 242; Becker v. Gibson, 70 Ind. 239; Gray v. Chicago etc. R. Co., 143 Iowa, 268, 121 N. W. 1097; Hood v. Chicago etc. R. Co., 95 Iowa, 331, 64 N. W. 261; Greeno v. Roark, 8 Kan. App. 390, 56 Pac. 329; Bannon v. Bannon etc. Pipe Co., 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; Louisville etc. R. Co. v. Berry, 9 Ky. Law Rep. 683; Provencher v. Moore, 105 Me. 87, 72 Atl. 880; Dodge v. Haskell, 69 Me. 429; Baltimore Refrigerating etc. Co. v. Kreiner, 109 Md. 361, 71 Atl. 1066; Zeihm v. Light etc. Co., 104 Md. 48,

others have done it before;³⁵ but, of course, when the repetition is a factor in the act or offense charged, the rule does not apply; for example, in the case of one charged with

64 Atl. 61; Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 N. E. 630; Howe v. Whitehead, 130 Mass. 268; Maguire v. Middlesex R. Co., 115 Mass. 239; Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116; Seitz v. Stark, 144 Mich. 448, 108 N. W. 354; O'Connor v. Hogan, 140 Mich. 613, 104 N. W. 29; Payson v. Everett, 12 Minn. 216; Seigfried v. Chicago etc. R. Co., 147 Mo. App. 543, 126 S. W. 798; Smith v. Jefferson Bank, 147 Mo. App. 461, 126 S. W. 810; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Hunt v. Van Burg, 75 Neb. 304, 106 N. W. 329; Patterson v. Bank, 73 Neb. 384, 102 N. W. 765; Crosby v. Wells, 73 N. J. L. 790, 67 Atl. 295; Scull v. Skillton, 70 N. J. L. 792, 59 Atl. 457; East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; True v. Sanborn, 27 N. H. 383; Scott v. Lowe, 136 App. Div. 442, 120 N. Y. Supp. 959; Jones v. Gilbert, 117 App. Div. 775, 102 N. Y. Supp. 983; Duckworth v. Rogers, 109 App. Div. 168, 95 N. Y. Supp. 1089; People v. Governale, 193 N. Y. 581, 86 N. E. 554; Raper v. Wilmington etc. R. Co., 126 N. C. 563, 36 S. E. 115; Sucker St. D. Co. v. Wirtz, 17 N. D. 313, 18 L. R. A., N. S., 134, 115 N. W. 844; Baltimore etc. R. Co. v. Van Horn, 21 Ohio C. C. 337, 12 Ohio Cir. Dec. 106; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Sharp v. Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Churchill v. Hebden, 32 R. I. 34, 78 Atl. 337; Burns v. Goddard, 72 S. C. 355, 71 S. E. 915; Benedict v. Rose, 24 S. C. 297; Franklin v. Franklin, 90 Tenn. 44, 16 S. W. 557; Massengill v. Shadden, 1 Heisk. (Tenn.) 357; State v. Quillen (Tex. Civ. App.), 115 S. W. 660; Gulf

etc. R. Co. v. Garrett (Tex. Civ. App.), 99 S. W. 162; Ross v. Moskowitz (Tex. Civ. App.), 95 S. W. 86; Konold v. Rio Grande Western R. Co., 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021; Comstock v. Jacobs (Vt.), 78 Atl. 1017; Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757; Virginia Iron etc. Co. v. Tomlinson, 104 Va. 249, 51 S. E. 362; Buell v. Aberdeen Bank, 58 Wash. 407, 108 Pac. 951; Sprenger v. Tacoma Trac. Co., 15 Wash. 660, 43 L. R. A. 706, 47 Pac. 17; Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 S. E. 119; Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810; Lowe v. Ring, 123 Wis. 107, 101 N. W. 381; Morawetz v. McGovern, 68 Wis. 312, 32 N. W. 290; Hallenborg v. Cobre Copper Co., 200 U. S. 239, 50 L. Ed. 458, 26 Sup. Ct. Rep. 236; Hollingham v. Head, 4 Com. B., N. S., 388, 4 Jur., N. S., 379, 27 L. J. C. P. 241, 5 Wkly. Rep. 442, 93 Eng. Com. L. 388; Edwards v. Ottawa River Nav. Co., 39 U. C. Q. B. 264; Election Case, 37 Can. St. Ct. 604.

³⁵ Spiva v. Stapleton, 38 Ala. 171; Gray v. Chicago etc. R. Co., 143 Iowa, 268, 121 N. W. 1097; Eskridge v. Cincinnati, N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580; Harmon v. Wright, 65 Me. 516; McIntire v. Talbot, 62 Me. 312; Packham v. Glendmeyer, 103 Md. 416, 63 Atl. 1048; Treiber v. Lanahan, 23 Md. 116; Stewart v. Cushing, 204 Mass. 154, 90 N. E. 545; McDowell v. Connecticut F. Ins. Co., 164 Mass. 394, 41 N. E. 669; Gilhooly v. Sanborn, 128 Mass. 485; Linn v. Gilman, 46 Mich. 628, 10 N. W. 46; Foye v. Leighton, 22 N. H. 71, 53 Am. Dec. 231; Kelly v. Durham Traction Co., 132 N. C. 368, 43 S. E. 923;

habitual drunkenness.³⁶ Under this head comes also the relevancy of the period of time which a particular act requires;³⁷ the alteration of other written instruments after execution where one of a series has been tampered with;³⁸ but not if the parties are different.³⁹ So the reputation of intemperance is not proof of the habit and will not support an allegation of intoxication at a given time.⁴⁰

Durham D. Co. v. Golden B. H. Co., 126 N. C. 292, 35 S. E. 586; *Rookard v. Atlantic etc. R. Co.*, 84 S. C. 190, 137 Am. St. Rep. 839, 27 L. R. A., N. S., 435, 65 S. E. 1047; *Ross v. Moskowitz* (Tex. Civ. App.), 95 S. W. 86; *Whitney v. First National Bank*, 55 Vt. 154, 45 Am. Dec. 598; *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979; *Morning Journal Assn. v. Duke*, 128 Fed. 657, 63 C. C. A. 459; *Seibert Cylinder Oil Cup Co. v. Williams Powell Co.*, 38 Fed. 600. See, also, *Plumb v. Bridge*, 128 App. Div. 651, 113 N. Y. Supp. 92, where a buyer of goods sold afterward by the seller for breach of the contract bought them from the purchaser at such record sale.

³⁶ *State v. Carr*, 146 Mo. 1, 47 S. W. 790.

³⁷ *Sias v. Munroe*, 134 Mass. 153.

³⁸ *Rankin v. Blackwell* 2 Johns. Cas. (N. Y.) 198. Although in *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904, it was excluded on the questionable ground that the forgery was to be proven by other forgeries. In *Booth v. Powers*, 56 N. Y. 22, 33, *Folger, J.*, in delivering the opinion of the court, said: "A majority of the court differ from me, and are of the opinion that the evidence offered, that another note, made at the same time, by the same parties, of the same tenor and date of the one converted, for the same consideration, payable at a different time of payment, was owned by the plain-

tiff and his deceased partner, and was by them altered in the same particular, after it came into their hands, without the authority, consent or ratification of the makers and was transferred by the payees, was properly excluded. Though it is permissible, on an issue of forgery of a note, for the purpose of showing fraudulent intention, to give evidence of the possession and uttering of other like forged notes (*Rex v. Wylie*, 4 Bos. & P. 92; *Rankin v. Blackwell*, 2 Johns. Cas. 198), the majority of the court think that that rule is not applicable in this case."

³⁹ *Winter v. Pool*, 100 Ala. 503, 14 South. 411; *Cotharin v. Davis*, 2 Mackey (D. C.), 230; *Paramore v. Lindsey*, 63 Mo. 63.

⁴⁰ *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232. See, also, *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447; *Lane v. Missouri Pac. R. Co.*, 132 Mo. 4, 33 S. W. 645, 1128; *Ryan v. New York etc. R. Co.*, 127 App. Div. 11, 111 N. Y. Supp. 21; *Senecal v. Thousand Island Steamboat Co.*, 79 Hun, 574, 29 N. Y. Supp. 884; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465; *Cleg-horn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

While evidence of earning capacity is nearly always relevant,⁴¹ it has been held that evidence of certain acts done in one part of the work was competent, as tending to show that a fellow-servant did not have sufficient judgment and presence of mind to be competent for the other part of the work in which he was employed.⁴² On questions of agency the fact of one having acted as agent for the principal is relevant. The value of such proof does not depend so much on the number of acts as upon their character.⁴³ So far as judgments are concerned, they are governed by the rule of *res adjudicata* and are dealt with in their appropriate places herein. To the extent of focusing the application of the specimen cases, we may put it that in the cases *inter partes* the leaning is toward considering other transactions relevant when they resemble each other in all essential features;⁴⁴ but that where they are with other

⁴¹ *Christian v. Columbus & R. Co.*, 90 Ga. 124, 15 S. E. 701; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa, 551, 87 N. W. 505; *Chicago R. I. & T. R. Co. v. Long*, 26 Tex. Civ. App. 601, 65 S. W. 882.

⁴² *Morrow v. St. Paul City Ry. Co.*, 74 Minn. 480, 77 N. W. 303.

⁴³ *Lake Shore Cattle Co. v. Mordoc Land & L. Co.*, 130 Cal. 669, 63 Pac. 72; *Moore v. Schrader*, 14 Ind. App. 69, 42 N. E. 490; *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927; *Hitchens v. Ricketts*, 17 Ind. 625; *Greenfield Bank v. Crafts*, 2 Allen (Mass.), 269. In England it has been held that more than one previous transaction must be shown (*Morris v. Bethell*, L. R. 4 C. P. 765, 5 C. P. 47), but there is an American authority that a single act ratified by the principal may be of so comprehensive a character as to establish the subsequent agency: *Wilcox v. Chicago M. & St. P. R. Co.*, 24 Minn. 269; *Bucknam v. Chaplin*, 1 Allen (Mass.), 70; *Gieger*

v. Levin, 113 N. Y. Supp. 1016; *Beattie v. Delaware, L. & W. R. Co.*, 90 N. Y. 643; *Hammond v. Varian*, 54 N. Y. 498; *Hill v. Nation Trust Co.*, 108 Pa. 1, 56 Am. Rep. 189; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008.

⁴⁴ *Clemons v. State*, 167 Ala. 20, 52 South. 467; *Fowler v. State*, 161 Ala. 1, 49 South. 788; *Southern R. Co. v. Gullatt*, 158 Ala. 502, 48 South. 472; *Hamburg Bank v. George*, 92 Ark. 472, 476, 123 S. W. 654; *People v. Miller* (Cal.), 78 Pac. 227; *Eatman v. State*, 48 Fla. 21, 37 South. 576; *Florida Cent. etc. R. Co. v. Mooney*, 45 Fla. 286, 110 Am. St. Rep. 73, 33 South. 1010; *Atlanta Ice etc. Co. v. Mixon*, 126 Ga. 457, 55 S. E. 237; *Hughes v. McHan*, 121 Ga. 499, 49 S. E. 590; *Funston v. Hoffman*, 232 Ill. 360, 83 N. E. 917; *Chicago etc. R. Co. v. Newell*, 212 Ill. 332, 72 N. E. 416; *Welfelt v. Illinois etc. R. Co.*, 149 Ill. App. 317; *Cleveland etc. R. Co. v. Loos*, 38

persons, then the trend of the decisions is the other way, because in all such instances, although there may be a *similarity* between the transaction offered in evidence and the one to be proved, there is no such *logical or necessary connection* that the existence of one tends to prove that of the other. There may also have been such dissimilar facts or circumstances, not offered in evidence, as to render the transaction relied on of no probative value. Other illustrations without limit might be given of transactions of this character which are held irrelevant as evidence, on the ground that they are "*res inter alios acta*"; but the cases

- Ind. App. 1, 77 N. E. 948; Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 43 N. E. 242; Atchison etc. R. Co. v. Dickens, 7 Ind. Ter. 16, 103 S. W. 750; Elbert v. Mitchell, 131 Iowa, 598, 109 N. W. 181; Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621; Black Diamond Coal etc. Co. v. Price, 33 Ky. Law Rep. 334, 108 S. W. 345; Finley v. Louisville R. Co., 31 Ky. Law Rep. 740, 103 S. W. 343; Sargent v. Hutchings, 86 Me. 28, 29 Atl. 926; Langford v. Manchester, 196 Mass. 211, 81 N. E. 884; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Commonwealth v. Campbell, 7 Allen (Mass.), 541, 83 Am. Dec. 705; Barker v. Kalamazoo, 146 Mich. 257, 109 N. W. 427; Patrick v. Howard, 47 Mich. 40, 10 N. W. 71; Finley v. Quirk, 9 Minn. 194, 86 Am. Dec. 93; Gray v. Thomas, 12 Smedes & M. (Miss.) 111; Horr v. Kansas etc. R. Co., 156 Mo. App. 651, 137 S. W. 1010; McGinnis v. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4; Hobbs v. Boatright, 195 Mo. 693, 113 Am. St. Rep. 709, 5 L. R. A., N. S., 906, 93 S. W. 934; Lander v. Sheehan, 32 Mont. 25, 79 Pac. 406; Mead v. Merrill, 33 N. H. 437; Trenton Temperance Hall Assn. v. Giles, 33 N. J. L. 260; Bookman v. New York, 133 App. Div. 242, 117 N. Y. Supp. 197; Draper v. Interborough Transit Co., 124 App. Div. 351, 108 N. Y. Supp. 686; People v. Molineux, 168 N. Y. 264, 10 N. Y. Annot. Cas. 256, 62 L. R. A. 193, 61 N. E. 286; Bullock v. Lake Drummond Canal etc. Co., 132 N. C. 179, 43 S. E. 593; Crossen v. Grandy, 42 Or. 282, 70 Pac. 906; Water Co. v. Ephrata, 24 Pa. Sup. Ct. 353; Staples v. Rhode Island etc. R. Co. (R. I.), 67 Atl. 431; Ballou v. Ballou, 30 R. I. 286, 74 Atl. 1089; Ragsdale v. Southern R. Co., 69 S. C. 429, 48 S. E. 466; Lynn v. Thomson, 17 S. C. 129; Adams v. Gulf etc. Ry. Co. (Civ. App.), 105 S. W. 526; Uecker v. Zuercher, 54 Tex. Civ. App. 289, 118 S. W. 149; Dallas v. McCullough (Tex. Civ. App.), 95 S. W. 1121; Slack v. Bragg, 83 Vt. 404, 76 Atl. 148; Washington etc. R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035; Welch v. Fransioli, 46 Wash. 530, 90 Pac. 644; Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 S. E. 119; Coman v. Wunderlich, 122 Wis. 138, 95 N. W. 612; Hadtke v. Grzyll, 130 Wis. 275, 110 N. W. 225; Sornberger v. Canadian-Pacific Ry. Co., 24 Ont. App. 263.

already cited sufficiently illustrate the principle, and we will now discuss certain other qualifications of the rule.

§ 141 (141). Facts apparently collateral may become relevant—Necessity for promise to connect.—The exclusion or admission of evidence, which is supposed by one party to be relevant, and by the other is considered as irrelevant, is frequently a matter of some difficulty. The general rules on this subject are, however, believed to be sufficiently clear and precise to prevent any injustice from being done. When the relevancy is not apparent from the evidence offered, but other facts will make it so, the duty of the party offering it is to state its connection with the other facts, in order that its relevancy may be disclosed to the court.⁴⁵ It is evident to everyone that a claim or defense frequently depends on a variety of facts and circumstances, either one of which, by itself, would seem to be irrelevant, and yet when the whole are made out, a complete case is presented;⁴⁶ but it by no means follows that a court will,

⁴⁵ 2 Stark. Ev. 381; *Crenshaw v. Davenport*, 6 Ala. 390, 41 Am. Dec. 56, with editorial note appended.

⁴⁶ *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 137 Am. St. Rep. 35, 51 South. 176; *Lambie v. State*, 151 Ala. 86, 44 South. 51; *Aycock v. Johnson*, 119 Ala. 405, 24 South. 543; *Tucker v. West*, 27 Ark. 386; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Johnson v. Calman*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905; *Quintard v. Corcoran*, 50 Conn. 34; *Moppin v. Aetna Axle etc. Co.*, 41 Conn. 27; *Thompson v. State*, 58 Fla. 106, 19 Ann. Cas. 116, 50 South. 507; *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240; *Holcombe v. State*, 5 Ga. App. 47, 62 S. E. 647; *Heffernan v. Bail*, 109 Ill. App. 231; *Peru Coal Co. v. Merrick*, 79 Ill. 112; *Indianapolis P. & C. R. Co. v. Anthony*, 43 Ind. 183; *Stewart v. Anderson*, 111

Iowa, 329, 82 N. W. 770; *Adams v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 565, 61 N. W. 1059; *State v. International Co.*, 79 Kan. 371, 99 Pac. 603; *Ballou v. Humphrey*, 8 Kan. 219; *Rollins v. Bartlett*, 21 Me. 565; *Simmons v. Haas*, 56 Md. 153; *Goodhand v. Benton*, 6 Gill & J. (Md.) 481; *Lowes v. Holbrook*, 1 Har. & J. (Md.) 153; *Crowley v. Boston etc. R. Co.*, 204 Mass. 241, 90 N. E. 532; *Commonwealth v. Williams*, 171 Mass. 461, 50 N. E. 1035; *Stanton v. Estey Mfg. Co.*, 90 Mich. 12, 51 N. W. 101; *Passmore v. Passmore*, 50 Mich. 626, 45 Am. Rep. 62, 16 N. W. 170; *Suzett v. Buckels*, 7 How. (Miss.) 663; *De Arman v. Taggart*, 65 Mo. App. 82; *Ritter v. Springfield First Nat. Bank*, 30 Mo. App. 652; *Neumeyer v. Hooker*, 131 App. Div. 592, 116 N. Y. Supp. 204; *Seymour v. Fellows*, 77 N. Y. 178; *Van Buren v. Wells*, 19 Wend. (N.

in every case, wade through apparently irrelevant testimony, unless the intention to connect with other facts, from which its relevancy will appear, is distinctly shown. When, therefore, evidence is offered, apparently not connected with the issue, and is opposed, it becomes the duty of the party offering it to show its connection with other facts, either in evidence, or intended to be given to the jury. It is impossible to prescribe the course which counsel shall pursue in putting a case to the jury, but they must always be prepared to explain the object for which the evidence is offered; and if this is not done, the court may lawfully reject that which is apparently irrelevant. This is the clear rule to be deduced from the cases.⁴⁷ If the party or his counsel cannot give the promise to connect the offered and irrelevant evidence with facts which will establish the relevancy, the testimony should not be received.⁴⁸

Y.) 203; Schock v. Solar Gaslight Co., 222 Pa. 271, 71 Atl. 94; Trego v. Lewis, 58 Pa. 463; Yeatman v. Hart, 6 Humph. (Tenn.) 375; San Antonio T. Co. v. Higdon (Tex. Civ. App.), 123 S. W. 732; Texas Tram. & Lumb. Co. v. Gwin (Tex. Civ. App.), 52 S. W. 110; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Cavendish v. Troy, 41 Vt. 99; Goodnow v. Parsons, 36 Vt. 46; State v. Cool, 66 W. Va. 86, 66 S. E. 740; Spick v. State, 140 Wis. 104, 121 N. W. 664; Sun Printing etc. Assn. v. Edwards, 136 Fed. 591, 69 C. C. A. 365; United States v. Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122.

⁴⁷ Crenshaw v. Davenport, *supra*; McGowan v. Bank of Kentucky, 5 Litt. (Ky.) 271; Harris v. Paynes, 5 Litt. (Ky.) 105; Wilson's Admrs. v. Bowen, 5 T. B. Mon. (Ky.) 33; Clark v. Beach, 6 Conn. 142; Rowt, Admx., v. Kile, 1 Leigh (Va.), 216; Benham v. Cary, 11 Wend. (N. Y.) 83; Weidler v. Farmers' Bank, 11 Serg. & R. (Pa.) 134; Turner v. Fendall, 1 Cranch (U.

S.), 117, 2 L. Ed. 53; Innerarity v. Byrne, 8 Port. (Ala.) 176; Jackson ex dem. Webb v. Roberts, 11 Wend. (N. Y.) 422; Gratz v. Gratz, 4 Rawle (Pa.), 411; Cowen & Hill's Notes (N. Y.), 434, 792; Mardis' Admrs. v. Shackelford, 4 Ala. 493.

⁴⁸ Western Union Tel. Co. v. Saunders, 164 Ala. 234, 137 Am. St. Rep. 35, 51 South. 176; Fletcher v. Tennessee Coal etc. Co., 163 Ala. 240, 50 South. 996; Aycock v. Johnson, 119 Ala. 405, 24 South. 543; Tucker v. West, 29 Ark. 386; Atlantic etc. R. Co. v. Partridge, 58 Fla. 153, 50 South. 634; Wilson v. Jernigan, 57 Fla. 277, 49 South. 44; Sullivan v. Sullivan, 139 Ill. App. 378; Hall v. Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Watson Coal & Min. Co. v. James, 72 Iowa, 184, 33 N. W. 622; Ballou v. Humphrey, 8 Kan. 219; Phillips v. Chase, 201 Mass. 444, 131 Am. St. Rep. 406, 87 N. E. 755; Commonwealth v. Tucker, 189 Mass. 457, 7 L. R. A., N. S., 1056, 76 N. E. 127; Conklin v. Consolidated R.

§ 141a (141). **Same—Custom—Cause and effect.**—Taylor gives numerous instances of the relevancy of apparently collateral facts. Thus, although in general the customs of one manor are not relevant to prove the customs of another, yet if it be proved that the customs of the two manors are identical or that the one was derived from the other, then the customs of each will become evidence.⁴⁹ Other illustrations given by him show that apparently collateral facts have been received to establish the ownership of land, when proof has been made to show such a *unity of character* between the spot in dispute and other parcels over which acts of ownership had been exercised as to lead to a fair inference that both were subject to the same rights and constituted in fact but parts of an entire property.⁵⁰ It may be stated generally that, “when there is a question whether an act was accidental or intentional, the fact that such act formed part of a *series of similar occurrences*, in each of which the person doing the act is

Co., 196 Mass. 302, 13 Ann. Cas. 857, 82 N. E. 23; Lockard v. Van Alstyne, 155 Mich. 507, 120 N. W. 1; Lansky v. Prettyman, 140 Mich. 40, 163 N. W. 538; Passmore v. Passmore, 50 Mich. 626, 45 Am. Rep. 62, 16 N. W. 170; Campbell v. Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; De Armen v. Taggart, 65 Mo. App. 82; Russell v. Chicago etc. R. Co., 37 Mont. 1, 94 Pac. 488, 501; Schock v. Solar Gaslight Co., 222 Pa. 271, 71 Atl. 94; Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608; Trego v. Lewis, 59 Pa. 463; State v. Madison, 23 S. D. 584, 122 N. W. 647; Missouri etc. R. Co. v. Moss (Tex. Civ. App.), 135 S. W. 626; Buchanan v. Wilburn (Tex. Civ. App.), 127 S. W. 1198; Uvalde County v. Oppenheimer (Tex. Civ. App.), 115 S. W. 904; Texas Tram etc. Co. v. Gwin (Tex. Civ. App.), 52 S. W. 110; Hurley v. Charles (W. Va.), 65 S. E. 468; United States v. Flowery, 1 Spr.

109, 25 Fed. Cas. No. 15,122; Sun Printing etc. Assn. v. Edwards, 136 Fed. 591, 69 C. C. A. 365; Rex v. Fursey, 6 Car. & P. 81, 25 Eng. Com. L. 293.

⁴⁹ Tayl. Ev., 10th ed., § 320; M. of Anglesey v. Ld. Hatherton, 10 Mees. & W. 235.

⁵⁰ Brisco v. Lomax, 8 Adol. & El. 198, 3 Nev. & P. 308, 112 Eng. Reprint, 812; Doe v. Kemp, 7 Bing. 332, 2 Bing. N. C. 102, 2 Scott, 9; Bryan v. Winwood, 1 Taunt. 208; Dendy v. Simpson, 18 Com. B. 831, 86 Eng. Com. L. 831; Jones v. Williams, 2 Mees. & W. 326; Stanley v. White, 14 East, 332; 104 Eng. Reprint, 630; Reg. v. Brightside Bierlow, 13 Q. B. 933, 116 Eng. Reprint, 1520; Peardon v. Underhill, 16 Q. B. 120, 117 Eng. Reprint, 824; Donegall v. Templemore, 9 Ir. L. Rep., N. S., 374, 406; In re Belfast Dock Act, L. R. 1 Eq. 128, 142; Taylor v. Parry, 1 Man. & G. 604, 615, 1 Scott N. R. 576.

concerned, is deemed to be relevant.”⁵¹ In the American edition of Stephen, the author adds⁵² that, when there is a question whether an accident shown to have happened was caused by the negligence of a defendant, the fact that other accidents of a similar character had previously happened at the same place is deemed to be relevant.⁵³ The cases here cited disclose a conflict upon this point, but the weight of authority is strongly in favor of the proposition as stated by Chief Justice Field, who said in response to the objection that permitting such evidence tended to introduce collateral issues and thus mislead the jury from the matter

⁵¹ Reynolds, Steph. Ev., art. 12, and cases cited. See §§ 147, 166, 167, 184, *post*. The illustration given by Stephen is apt. A is accused of setting fire to his house in order to obtain money for which it is insured. The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant as tending to show that the fires were not accidental: *Rex v. Gray*, 4 Fost. & F. 1102. A New York case is very similar: *Faucett v. Nichols*, 64 N. Y. 377. The fact in issue, to which this evidence related, was whether the defendant's barn was fired by an incendiary. If there had been a series of incendiary fires in that village previous to and near the time of the fire in question, could not this fact have been shown in aid of the defense? It cannot be denied that in connection with the other circumstances proved, it would have produced upon the mind a strong conviction that the fire in the defendant's barn was also caused by an incendiary.

⁵² Reynolds, Steph. Dig. Ev., p. 25.

⁵³ *Nye v. Dibley*, 88 Minn. 465, 93

N. W. 524; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Brewing Co. v. Bauer*, 50 Ohio St. 560, 40 Am. St. Rep. 686, 35 N. E. 55; *Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed. 665, 14 C. C. A. 615; *Chicago Gt. Western Ry. Co. v. McDonough*, 161 Fed. 657, 88 C. C. A. 517; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *District of Columbia v. Arms*, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840. A so-called conflict is directly raised by *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735 (with explanatory editorial note), the question certified by the circuit court being, “Ought the court to have admitted evidence of former accidents at the same place to parties other than the plaintiff?” and answered in the negative. Apart from the weight of authority altogether, the inclusion of the last four words of the question points a moral. If the accident had repeatedly happened to the plaintiff, would not the admission of the evidence have tended to show knowledge by the plaintiff and a large contribution to the suggested negligence?

directly in controversy: "Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities."⁵⁴ We have seen that

⁵⁴ Approved in *Vos v. Carroll*, 123 Fed. 1008, reaffirming rule; *Franklin v. Missouri K. & G. Ry. Co.*, 97 Mo. App. 480, 71 S. W. 541, holding where master furnished lot of mauls, from which servant selected one, by reason of defect in which he was hurt, he may show that whole lot were chipped and slivered; *Golden v. Chicago etc. Ry. Co.*, 84 Mo. App. 66, holding, where pleading raises issue whether object in highway is calculated to frighten horses, evidence that it had frightened other horses than those involved in case is admissible; *Piper v. Spokane*, 22 Wash. 150, 60 Pac. 139, admitting, in action against city for damages for injuries received through defective sidewalk, evidence to show that others had fallen at same place within short time of plaintiff's injury; *Meyers v. Falk*, 99 Va. 388,

389, 38 S. E. 179, holding master's knowledge of incompetency of servant or of defects in machinery may be established either by actual knowledge, or such frequent acts of incompetency on part of servant, or existence of defects for such length of time that knowledge would be presumed. (C. L. Thompson's Notes to United States Reports.) In *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, occurs the following strong emphasis, citing *District of Columbia v. Armes*, *supra*: "The testimony of the witnesses who were driving or observing these animals that gentle and tractable horses had been frightened while they were traveling upon this bridge by the blasts of this whistle at various times preceding the accident was upon both reason and authority material and

contracts of a party with *strangers* are generally held irrelevant as evidence of the contract alleged, and that *other contracts and dealings between the same parties* are sometimes received to prove their course of dealing or intention or relations, or the probability or improbability of entering into the contract claimed.⁵⁵ In determining whether certain effects have been produced by the causes alleged it has frequently been held that the testimony need not be confined to the effect in the case upon trial, but that proof of the *effect upon other property* similarly situated may be received.⁵⁶ Thus, in an action for nuisance, proof was admitted that defendants' mill threw dust and soot on other houses. This tended to show that the mill was capable of inflicting the injury complained of. If the deposit was general in the immediate neighborhood, and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of the

persuasive evidence that these blasts were of a character likely to frighten horses under such circumstances, that their fright and flight were natural and probable consequences of the production of the blast, and that these facts were so notorious that they might be considered by the jury to constitute notice to the city of the dangerous character and probable effects of the blowing of this whistle."

⁵⁵ *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925; *Mabry v. Cheadle* (Iowa), 80 N. W. 312; *Holmes v. Goldsmith*, 147 U. S. 150, 162, 37 L. Ed. 118, 13 Sup. Ct. Rep. 288; *Huntsman v. Nichols*, 116 Mass. 521; *Tibbetts v. Sumner*, 19 Pick. (Mass.) 166. See § 139 et seq., *ante*.

⁵⁶ *Birmingham v. Starr*, 112 Ala. 98, 20 South. 424; *Leonhart v. California Wine Assn.*, 5 Cal. App. 19, 89 Pac. 847; *Denver etc. R. Co. v. Glasseott*, 4 Colo. 270; *Standard Cotton Mills v. Cheatham*, 125 Ga. 649,

54 S. E. 650; *Rowlands v. Elgin*, 66 Ill. App. 66; *Schmidt v. Dubuque County*, 136 Iowa, 401, 113 N. W. 820; *Heinmiller v. Winston*, 131 Iowa, 32, 117 Am. St. Rep. 405, 6 L. R. A., N. S., 150, 107 N. W. 1102; *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677; *Craver v. Hornburg*, 26 Kan. 94; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Baltimore etc. R. Co. v. Sattler*, 100 Md. 306, 3 Ann. Cas. 660, 59 Atl. 654; *Yore v. Newton*, 194 Mass. 250, 80 N. E. 472; *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169, 171, 85 Am. Dec. 697; *Kuh v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 138, 9 N. Y. Supp. 710; *Houston Cotton Oil Co. v. Trammell* (Tex. Civ. App.), 72 S. W. 244; *Meyer v. Wolnitzek* (Tex. Civ. App.), 63 S. W. 1058; *Reg. v. Cooper*, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T., N. S., 754, 24 Wkly. Rep. 279; *Reg. v. Stenson*, 12 Cox C. C. 111, 25 L. T., N. S., 666.

house in question.⁵⁷ On the same principle the result of defects in roads and ways, or structures, or sounds frightening animals, causative of recurring accidents,⁵⁸ the effect of escaping gases,⁵⁹ of the operation of elevated railroads,⁶⁰ and of water,⁶¹ upon other premises under like conditions has been received. And, as necessary corollary, it is competent in such circumstances to show that different results have flowed from the causes than those alleged, and that with a change in the cause a corresponding change in effect is created, and finally that with a removal of the alleged cause the effect has abated.⁶² But it will be found

⁵⁷ *Cooper v. Randall*, 59 Ill. 317, 320.

⁵⁸ *Birmingham U. R. Co. v. Alexander*, 93 Ala. 133, 9 South. 525; *Southern R. Co. v. Posey*, 124 Ala. 486, 26 South. 914; *Sanderson v. Frazier*, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; *House v. Metcalf*, 27 Conn. 631; *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624; *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288; *Elgin v. Thompson*, 98 Ill. App. 358; *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341; *Madison Twp. v. Scott*, 9 Kan. App. 871, 61 Pac. 967; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Georgetown etc. Turnpike Road Co. v. Cannon*, 12 Ky. Law Rep. 257; *Crocker v. McGeorge*, 76 Me. 282, 49 Am. Rep. 611; *Hill v. Portland etc. R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Dow v. Wear*, 68 N. H. 345, 44 Atl. 489; *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Rogers v. New York etc. Bridge*, 159 N. Y. 556, 54 N. E. 1094; *Burns v. Schenectady*, 24 Hun (N. Y.), 10; *Wilder v. Metropolitan St. R. Co.*, 10 App. Div. 364, 41 N. Y. Supp. 931; *Lake Shore etc. R. Co. v. Beall*, 13 Ohio C. C. 605, 6 Ohio Cir.

Dec. 250; *Beardslee v. Columbia Tp.*, 5 Lack. Leg. N. (Pa.) 290; *Cheney v. Ryegate*, 55 Vt. 499; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *District of Columbia v. Arms*, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840; *Brown v. Eastern etc. R. Co.*, 22 Q. D. B. 391, 58 L. J. Q. B. 212.

⁵⁹ *Kopplan v. Gaslight Co.*, 177 Mass. 15, 58 N. E. 183; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681, 30 L. R. A. 651, 42 N. E. 513; *Barriekman v. Marion Oil Co.*, 45 W. Va. 634, 44 L. R. A. 92, 32 S. E. 327.

⁶⁰ *Doyle v. Manhattan Ry. Co.*, 128 N. Y. 488, 28 N. E. 495; *Hine v. New York etc. Ry. Co.*, 149 N. Y. 154, 43 N. E. 414.

⁶¹ *Hawks v. Charlemont*, 110 Mass. 110; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895.

⁶² *Remy v. Olds (Cal.)*, 34 Pac. 216; *Wilmington Dental Mfg. Co. v. Adams Express Co.*, 8 Houst. (Del.) 329, 32 Atl. 250; *Funston v. Hoffman*, 232 Ill. 360, 83 N. E. 917; *Lotz v. Scott*, 103 Ind. 155, 2 N. E. 560; *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18; *Hodgkins v. Chappell*, 128 Mass. 197; *Finn v. Clark*, 12 Allen (Mass.), 522; *Avery v. Burral*, 118 Mich. 672, 77 N. W. 272;

that the cases admitting testimony of this character have all recognized the rule that *substantial similarity of conditions* must first be shown. In other cases testimony of this character has been excluded on the ground that it would involve the jury in a mass of collateral inquiries only to confuse.⁶³

§ 142 (142). Same—Knowledge—Intent.—In the absence of any admission as to the extent of a party's knowledge of the matter in issue, or of the motives which actuated the commission or omission of his acts, or provoked his intention as to a line of conduct, evidence of his previous statements or behavior, as well as of later acts, furnishes the foundation on which an inference may be based; and experience has shown that the largest class of cases in which facts apparently collateral to the issue are admitted is that in which it becomes material to prove knowledge or intent. When it becomes material to show the motive or intent which inspired an act, or the knowledge under which one has acted, it is relevant for such purpose, under certain limitations, to prove *other similar acts* which explain such motive or bring home to the party the knowledge sought to be proved. Stephen thus more fully states the rule: "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occa-

Klein v. Burleson, 138 App. Div. 405, 122 N. Y. Supp. 752; Shirley v. Keagy, 126 Pa. 282, 17 Atl. 607; Chase v. Blodgett Milling Co., 111 Wis. 655, 87 N. W. 826; Whitaker v. Bank of England, 6 Car. & P. 700, 25 Eng. Com. L. 646. See, also, Mill's Logic, c. 8, §§ 1, 2.

⁶³ Metropolitan W. S. E. R. Co. v. Dickinson, 161 Ill. 22, 43 N. E. 706; Ramsey v. Rushville & M. Gravel Road Co., 81 Ind. 394; Louisville Water Co. v. Weis (Ky.), 76 S. W. 356; Hughes v. General Electric L.

& P. Co. (Ky.), 54 S. W. 723; Bremner v. New Castle, 83 Me. 415, 23 Am. St. Rep. 782, 22 Atl. 382; Branch v. Libbey, 78 Me. 321, 57 Am. Rep. 810, 5 Atl. 71; Parker v. Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Schoonmaker v. Wilbraham, 110 Mass. 134; Kidder v. Dunstable, 11 Gray (Mass.), 342; Goble v. Kansas City, 148 Mo. 470, 50 S. W. 84; Western Ins. Co. v. Tobin, 32 Ohio St. 77; Barrett v. Hammond, 87 Wis. 654, 58 N. W. 1053.

sion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner."⁶⁴ It frequently happens that such motive or intent can be shown in no other way, while a single act might leave the secret motives of the party in doubt. Such act, in connection with others of the same character, may afford decisive proof and remove all uncertainty.⁶⁵ Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy.⁶⁶ A well-known case⁶⁷ cited by Mr. Justice Story turned on this point. There the action was trover to recover back goods which had been purchased by an agent for his principal by means of a fraud. In order to establish the plaintiff's case, it became necessary to show that other purchases had been made by the same agent for the same principal, under circumstances strongly presumptive of a like fraud. No doubt was entertained by the court of the admissibility of the evidence; and the main point urged at the bar was that the agent should himself have been called to establish the purchases, but this objection was overruled, and the jury, having found a verdict for the plaintiff, the court gave judgment in his favor. It is a general principle of law

⁶⁴ Steph. Ev., art. 11. On the general subject of this section, see extended note, 44 Am. Rep. 299-308.

⁶⁵ State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69; Wood v. United

States, 16 Pet. (U. S.) 342, 10 L. Ed. 987.

⁶⁶ Wood v. United States, *supra*.

⁶⁷ Irving v. Motley, 7 Bing. Rep. 543, 9 L. J. (O. S.) C. P. 161, 5 M. & P. 380.

that whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible. It has often been held in civil cases based on fraud or deceit that, on the question of *intent to defraud*, other similar acts or representations at about the same time as the one in question, where the *scienter* is, as it invariably is, a factor, are relevant.⁶⁸ In cases of obtaining goods under false pretenses, it very often happens that the defendant has been in some kind of business of which buying and selling goods on credit makes a part; and in such case the difficulty is, to draw the line between the points

⁶⁸ Davidson v. Kahn, 119 Ala. 364, 24 South. 583; Nelms v. Steiner, 113 Ala. 562, 22 South. 435; Turner v. Luning, 105 Cal. 124, 38 Pac. 687; Bancroft v. Heringhi, 54 Cal. 120; Thomas v. Beck, 39 Conn. 241; Denham v. State, 5 Ga. App. 303, 63 S. E. 62; Lockwood v. Doane, 107 Ill. 235; Blalock v. Randall, 76 Ill. 224; Strong v. State, 86 Ind. 208, 44 Am. Rep. 299; Gibson v. Seney, 138 Iowa, 383, 116 N. W. 325; Porter v. Stone, 62 Iowa, 442, 17 N. W. 654; Elerick v. Reid, 54 Kan. 579, 38 Pac. 814; Nichols v. Baker, 75 Me. 334; McKenny v. Dingley, 4 Greenl. (Me.) 172; Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938; Jordan v. Osgood, 109 Mass. 457, 461, 12 Am. Rep. 731; Hyman v. Kirt, 153 Mich. 113, 116 N. W. 536; Ward v. Cook, 158 Mich. 283, 122 N. W. 785; French v. Ryan, 104 Mich. 625, 62 N. W. 1016; Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; Bernheim v. Dibrell, 66 Miss. 199, 5 South. 693; State v. Tabor, 95 Mo. 585, 8 S. W. 744; Hall v. Naylor, 18 N. Y. 588, 75 Am. Dec. 269; Phillips v. People, 57 Barb. (N. Y.) 353; Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; Baldwin v. Short, 125

N. Y. 553, 26 N. E. 928; Adams v. Kenney, 59 N. H. 133; Harris v. Delaware etc. R. Co., 77 N. J. L. 278, 72 Atl. 50; Brink v. Black, 77 N. C. 59; Tarbox v. State, 38 Ohio St. 581; Brown v. Schock, 77 Pa. 471; Helfrich v. Stem, 17 Pa. 143; Sarle v. Arnold, 7 R. I. 582; Crosland v. Graham, 83 S. C. 228, 65 S. E. 233; Brown v. Newell, 64 S. C. 27, 41 S. E. 835; Compagnie Des Metaux Unital v. Victoria Mfg. Co. (Tex. Civ.), 107 S. W. 651; Bradley Fertilizer Co. v. Fuller, 58 Vt. 315, 2 Atl. 162; Pierce v. Hoffman, 24 Vt. 525; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243; Stack v. Nolte, 29 Wash. 188, 69 Pac. 753; Butler v. Watkins, 13 Wall. (U. S.) 456, 20 L. Ed. 629; Wood v. United States, 16 Pet. (U. S.) 342, 10 L. Ed. 987; Castle v. Bullard, 23 How. (U. S.) 172, 16 L. Ed. 424; Mudsill Min. Co. v. Watrous, 61 Fed. 163, 9 C. C. A. 415, 18 Morr. Min. Rep. 1; Lincoln v. Clafin, 7 Wall. (U. S.) 132, 19 L. Ed. 106; New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. Ed. 997, 6 Sup. Ct. Rep. 877; Jack v. Mutual Reserve F. & L. Assn., 113 Fed. 49, 51 C. C. A. 36; Gibson v. Hunter, 2 H. Black. (Eng.) 288.

where legitimate business ceases and fraud begins. In such cases, says Cushing, C. J.,⁶⁹ a single purchase of goods on credit might happen in the ordinary course of business; but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew he was in failing circumstances, and that he did not intend to pay for them, or expect that he should be able to do it. Of course the effect of such testimony would depend upon the number and amount of such purchases, the after-disposition of the goods purchased, and all the other circumstances.⁷⁰ Thus, where it is claimed that purchases were fraudulently made by one knowing himself to be insolvent and with the pre-conceived intent not to pay, it is relevant to show *other purchases* on credit at or about the same time.⁷¹ Where commission agents were charged with selling the plaintiff's goods to an insolvent, knowing him so to be, and evidence was given for the plaintiff of similar dealings by them with the goods of others about the same time, Mr. Justice Clifford said: "According to the evidence, some of those purchases were prior and others subsequent to the period of the sale of the goods in this case. All of this class of exceptions may well be considered together, as they involve the same general principles in the law of evidence. Decided cases have established the doctrine that cases of fraud like the present are among the well-recognized exceptions to the general rule, that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect

⁶⁹ *State v. Lapage*, *supra*.

⁷⁰ *Commonwealth v. Eastman*, 1
Cush. (Mass.) 189, 48 Am. Dec. 596;

Bradley v. Obear, 10 N. H. 477;

Hovey v. Grant, 52 N. H. 569.

⁷¹ *Hennequin v. Naylor*, 24 N. Y.
139; *Turner v. Luning*, 105 Cal. 124,
38 Pac. 687.

to the matters charged against him in the declaration. Some of the decided cases go further, and hold that such evidence is admissible, as affording a ground of presumption to prove the main charge; but, whether so or not, it is clearly competent, as tending to show the intent of the actor in respect to the matters immediately involved in the issue on trial.⁷² In an action to recover goods, sold by the plaintiffs to E., and by his directions delivered to defendant—the plaintiffs claiming that the sale had been procured by fraud, and that it had been on that account rescinded by them—evidence of transactions by which defendants and E. had obtained goods from other persons by means similar to those used in the case in question was admissible for the plaintiffs.⁷³ The law is quite clear that, if the act complained of is one of a nefarious series, part of a set plan or correlated commission of fraudulent dealings which shows that the one charged has devoted a misdirected energy to the acquisition of money or property by cheating or other illegal practices, evidence of it is always relevant. In an action to set aside a sale of land on the ground that the vendee has falsely represented himself to be a man of property, it is relevant to show *similar representations* to others at about the same time to show a general scheme to amass property by fraud.⁷⁴ So on the issue of fraudulent intent, it is relevant to show *other voluntary conveyances*, conveyances to relatives or similar transactions with others tending to show a common fraudulent scheme.⁷⁵ When it

⁷² *Castle v. Bullard*, 23 How. (64 U. S.) 172, 16 L. Ed. 424.

⁷³ *Bancroft & Co. v. Heringhi*, 54 Cal. 120.

⁷⁴ *McKenney v. Dingley*, 4 Greenl. (Me.) 172; *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243; *French v. Ryan*, 104 Mich. 625, 62 N. W. 1016.

⁷⁵ *Lowe v. State*, 134 Ala. 154, 32 South. 273; *Hawes v. State*, 88 Ala. 37, 7 South. 302; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Cob-*

ler, 108 Cal. 538, 41 Pac. 401; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240; *Stolp v. Blair*, 68 Ill. 541; *Card v. State*, 109 Ind. 415, 421, 9 N. E. 591; *McGuire v. Iowa Co.*, 133 Iowa, 636, 111 N. W. 34; *Kelliher v. Sutton*, 115 Iowa, 632, 89 N. W. 26; *State v. Soper*, 118 Iowa, 1, 91 N. W. 774; *State v. Folwell*, 14 Kan. 105; *Eaton v. New England Tel. Co.*, 68 Me. 63; *Fowle v. Child*, 164 Mass. 210, 214, 49 Am.

is claimed that the acceptor of a bill knows the name of the payee to be fictitious, it is relevant to show that he has accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person.⁷⁶ And evidence is properly admissible which is designed to show that the payee of a note perpetrated the fraud on the plaintiff in pursuance of a systematic method, and to show other similar fraudulent practices in obtaining other persons to sign notes.⁷⁷ In cases of fraud, considerable freedom is allowed in the admission of evidence; and, where fraud in the purchase or sale of property is in issue, other frauds of like character, committed by the same parties at or near the same time, are admissible. The admissibility of such evidence is placed

St. Rep. 451, 21 N. E. 291; Commonwealth v. Jackson, 132 Mass. 16, 18; Commonwealth v. Robinson, 146 Mass. 571, 577, 16 N. E. 452; Tyson v. Booth, 100 Mass. 258; Brownell v. Briggs, 173 Mass. 529, 54 N. E. 251; Ayres v. Hubbard, 71 Mich. 594, 40 N. W. 10; State v. Ames, 90 Minn. 183, 96 N. W. 330; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Tabor, 95 Mo. 585, 8 S. W. 744; State v. May, 142 Mo. 135, 43 S. W. 637; Barber v. Martin, 67 Neb. 445, 93 N. W. 722; Hovey v. Grant, 52 N. H. 569; Haines v. Republic F. Ins. Co., 52 N. H. 467; People v. Peckens, 153 N. Y. 576, 47 N. E. 883; Mayer v. People, 80 N. Y. 364; Phillips v. People, 57 Barb. (N. Y.) 353; Costello v. Herbst, 16 Misc. Rep. 687, 38 N. Y. Supp. 1123; Shaffner v. Commonwealth, 72 Pa. 60, 13 Am. Rep. 649; Swan v. Commonwealth, 104 Pa. 218; Goersen v. Commonwealth, 106 Pa. 477, 51 Am. Rep. 534; Homewood People's Bank v. Marshall, 223 Pa. 289, 72 Atl. 627; State v. Halpin, 16 S. D. 170, 91 N.

W. 605; Moore v. State, 28 Tex. App. 377, 13 S. W. 152; Western Union Tel. Co. v. Simmons (Tex. Civ. App.), 93 S. W. 686; Gray v. Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105; Groszehmigem v. State, 57 Tex. Cr. 241, 121 S. W. 1113; State v. Eastwood, 73 Vt. 205, 50 Atl. 1077; Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. 505; New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. Ed. 997, 6 Sup. Ct. Rep. 877; Butler v. Watkins, 13 Wall. (U. S.) 456, 20 L. Ed. 629; Cunard Steamship Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310; In re Friedman, 164 Fed. 131; Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; Makin v. Attorney General (1894), App. Cas. 57, 17 Cox C. C. 704, 58 J. P. 148, 63 L. J. P. C. 41, 69 L. T., N. S., 778, 6 Reports, 373; Reg. v. Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T., N. S., 503, 23 Wkly. Rep. 663.

⁷⁶ Gibson v. Hunter, 2 H. Black. 288.

⁷⁷ Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940.

on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive.⁷⁸ Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that *similar conduct toward another*, at about the same time and in relation to a like subject, was actuated by the same spirit.⁷⁹ But in cases of this character the evidence of other transactions is irrelevant, unless such collateral acts are shown to be so connected with the matters in litigation as to make it apparent that the party to be charged had a common purpose in both.⁸⁰ From the necessity of the case, where evidence is *circumstantial* in its nature and offered to prove motive or intent, considerable latitude must often be allowed, since the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other.⁸¹

§ 143 (143). Same—Proof of other crimes than the one in issue.—"From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to

⁷⁸ West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 South. 176.

⁷⁹ Butler v. Walkins, 13 Wall. (U. S.) 456, 20 L. Ed. 629; Anderson v. Scott, 70 N. H. 535, 49 Atl. 568; Brown v. Newell, 64 S. C. 69, 41 S. E. 850.

⁸⁰ Williams v. Robbins, 15 Gray (Mass.), 590; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Hardy v. Moore, 62 Iowa, 65, 17 N. W. 200.

⁸¹ Moore v. United States, 150 U. S. 57, 37 L. Ed. 996, 14 Sup. Ct. Rep. 26; Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954, 11 Sup. Ct. Rep. 350; Castle v. Bullard, 23 How. (U. S.) 172, 16 L. Ed. 424; Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; Baugher v. Boley (Fla.), 58 South. 980.

punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him." So spake Dodge, J., in a clear and concise review of the subject in a Wisconsin case.⁸² And hence the recognition of the familiar rule that it is improper on the trial of a defendant for a crime to prove that he has committed other crimes, having no connection with the one under investigation. Such other acts of criminality or immorality are not legally relevant, and should not be dragged in to prejudice the defendant or to create a probability of guilt.⁸³ This is so elementary that it is only

⁸² Paulson v. State, 118 Wis. 89, 94 N. W. 771. The cases in which overzealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number. Many are collected in a note in Whart. Crim. Ev., 9th ed., § 30. A few others may be cited: Regina v. Oddy, 5 Cox C. C. 210; Boyd v. United States, 142 U. S. 450, 458, 35 L. Ed. 1077, 12 Sup. Ct. Rep. 292; Shaffner v. Commonwealth, 72 Pa. 60, 13 Am. Rep. 649; Commonwealth v. Jackson, 132 Mass. 16; Sullivan v. O'Leary, 146 Mass. 322, 15 N. E. 775; Lightfoot v. People, 16 Mich. 507; Albright v. State, 6 Wis. 74; Schaser v. State, 36 Wis. 429; State v. Miller, 47 Wis. 530, 3 N. W. 31; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Fossdahl v. State, 89 Wis. 482, 62 N. W. 185.

⁸³ Butler v. State, 162 Ala. 71, 50 South. 400; Abrams v. State, 155 Ala. 105, 46 South. 464; Gray v. State, 160 Ala. 107, 49 South. 678; Ware v.

State, 91 Ark. 555, 131 S. W. 927; Endaily v. State, 39 Ark. 278; People v. Jones, 12 Cal. App. 129, 106 Pac. 724; People v. Walker, 142 Cal. 90, 75 Pac. 658; People v. Martin, 13 Cal. App. 96, 108 Pac. 1034; Jaynes v. People, 44 Colo. 535, 16 Ann. Cas. 787, 99 Pac. 325; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417; State v. Sebastian, 81 Conn. 1, 69 Atl. 1054; Webb v. State, 7 Ga. App. 35, 66 S. E. 27; Robinson v. State, 6 Ga. App. 696, 65 S. E. 792; McWhorter v. State, 118 Ga. 55, 44 S. E. 873; State v. Lancaster, 10 Idaho, 410, 78 Pac. 1081; Bishop v. People, 194 Ill. 365, 62 N. E. 785; Janzen v. People, 159 Ill. 440, 42 N. E. 862; Strong v. State, 86 Ind. 208, 44 Am. Rep. 292; Miller v. State, 174 Ind. 255, 91 N. E. 930; Clampitt v. United States, 6 Ind. Ter. 92, 10 Ann. Cas. 1087, 89 S. W. 666; State v. Yates, 145 Iowa, 332, 124 N. W. 174; State v. Matheson, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430, 103 N. W. 137; State v. Hansford, 81 Kan. 300, 106

necessary to discuss the exceptions which tend to illustrate

Pac. 738; *State v. Kirby*, 62 Kan. 436, 63 Pac. 752; *Britton v. Commonwealth*, 123 Ky. 411, 96 S. W. 556, 29 Ky. Law Rep. 857; *Watson v. Commonwealth*, 132 Ky. 46, 116 S. W. 287; *State v. Holland*, 120 La. 429, 14 Ann. Cas. 692, 45 South. 380; *State v. Reggio*, 124 La. 614, 50 South. 600; *World v. State*, 50 Md. 49; *Commonwealth v. Parsons*, 195 Mass. 560, 81 N. E. 291; *Commonwealth v. Campbell*, 155 Mass. 537, 30 N. E. 72; *People v. Giddings*, 159 Mich. 523, 18 Ann. Cas. 844, 124 N. W. 546; *People v. Minney*, 155 Mich. 534, 119 N. W. 918; *People v. Klise*, 156 Mich. 373, 120 N. W. 989; *State v. Fournier*, 108 Minn. 402, 122 N. W. 329; *State v. Fitchette*, 88 Minn. 145, 92 N. W. 527; *State v. Stike*, 140 Mo. App. 104, 129 S. W. 1024; *State v. McNamara*, 212 Mo. 150, 110 S. W. 1067; *State v. Missouri etc. R. Co.*, 219 Mo. 156, 117 S. W. 1173; *Thomas v. Yazoo*, 95 Miss. 395, 48 South. 821, 1041; *Dabney v. State*, 82 Miss. 252, 33 South. 973; *State v. Radmilovich*, 40 Mont. 93, 105 Pac. 91; *State v. Routzahn*, 81 Neb. 133, 129 Am. St. Rep. 675, 115 N. W. 759; *Smothers v. State*, 81 Neb. 426, 116 N. W. 152; *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733; *State v. Davis*, 69 N. H. 350, 41 Atl. 267; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *Roper v. Territory*, 7 N. M. 255, 33 Pac. 1014; *People v. Hill*, 198 N. Y. 64, 91 N. E. 272; *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48; *People v. Molineux*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286; *State v. Hight*, 150 N. C. 817, 63 S. E. 1043; *State v. McCall*, 131 N. C. 798, 42 S. E. 894; *State v. Laechelt*, 18 N. D. 88, 118 N. W. 240; *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374; *State v. Kent*, 5 N. D. 516,

35 L. R. A. 518, 67 N. W. 1052; *Barton v. State*, 18 Ohio, 221; *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381; *State v. Smith*, 55 Or. 408, 106 Pac. 797; *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892; *Commonwealth v. House*, 223 Pa. 487, 72 Atl. 804; *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649; *Commonwealth v. Biddle*, 200 Pa. 647, 50 Atl. 264; *United States v. Tanjuaneco*, 1 Phil. Isl. 116; *State v. Letourneau*, 24 R. I. 3, 96 Am. St. Rep. 696, 51 Atl. 1048; *State v. Odel*, 3 Brev. (S. C.) 552; *State v. La Mont*, 23 S. D. 174, 120 N. W. 1104; *Gardner v. State*, 121 Tenn. 684, 120 S. W. 816; *State v. Poe*, 8 Lea (Tenn.), 647; *Windham v. State* (Tex. Cr.), 128 S. W. 1130; *Lightfoot v. State* (Tex. Cr.), 106 S. W. 345; *Smith v. State*, 51 Tex. Cr. 427, 102 S. W. 406; *State v. Williams*, 36 Utah, 273, 103 Pac. 250; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215; *State v. Sanderson*, 83 Vt. 351, 75 Atl. 961; *State v. Leonard*, 72 Vt. 102, 47 Atl. 395, *Haynes v. Commonwealth*, 104 Va. 854, 52 S. E. 358; *Cole v. Commonwealth*, 5 Gratt. (Va.) 696; *State v. Marselle*, 43 Wash. 273, 86 Pac. 586; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *Davis v. State*, 134 Wis. 632, 115 N. W. 150; *Topolewski v. State*, 130 Wis. 244, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627, 7 L. R. A., N. S., 756, 109 N. W. 1037; *Fields v. Territory*, 1 Wyo. 78; *Boyd v. United States*, 142 U. S. 450, 35 L. Ed. 1077, 12 Sup. Ct. Rep. 292; *Waight v. United States*, 28 Fed. Cas. No. 17,042, 1 Hayw. & H. 189; *Sorenson v. United States*, 168 Fed. 785, 94 C. C. A. 181; *Ryan v. United States*, 26 App. D. C. 74, 6 Ann. Cas. 633; *Dimmick v. United States*, 135 Fed. 257, 70 C. C.

the general rule.⁸⁴ In criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry than that it tends to throw light on what were his *motives and intentions* in doing the act complained of.

A. 141; Reg. v. Hendershott, 26 Ont. 678; Reg. v. Holt, Bell C. C. 280, 8 Cox C. C. 411, 6 Jur., N. S., 1121, 30 L. J. M. C. 11, 3 L. T., N. S., 310, 9 Wkly. Rep. 74; Reg. v. Flannagan, 15 Cox C. C. 403.

⁸⁴ Paulson v. State, *supra*; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017. But the evidence which is incompetent if offered for one purpose is very frequently admissible when offered for another. A very common instance of this condition in a criminal trial is found in the admission of proof that the defendant (when he has offered himself as a witness in the case) has been convicted of other crimes, whether like or unlike that under which he is being then tried. Such proof is admitted solely for the purpose of affecting the credibility of the defendant, and the fact that it may leave upon the jury the impression that the defendant has a criminal propensity does not justify its exclusion: State v. Hummer, 72 N. J. L. 328, 62 Atl. 388. See valuable notes on the subject of this section appended to the case of Strong v. State (86 Ind. 208), 44 Am. Rep. 299; State v. Hull (18 R. I. 207, 26 Atl. 191), 20 L. R. A. 609, and People v. Molineux (168 N. Y. 264, 61 N. E. 286), 62 L. R. A. 193. The last-mentioned "note" is really a comprehensive survey of the law of evidence of other crimes in criminal cases, and covers not only the question of relevancy, but the whole range of evidence necessary to show motive, intent and malice, and may be regarded as a safe

and useful work for reference, to which also we acknowledge our obligation for the statement of many excellent propositions. See, also, Cox v. State, 162 Ala. 398, 50 South. 398; Bradford v. State, 147 Ala. 95, 41 South. 462; Storms v. State, 81 Ark. 25, 98 S. W. 678; Johnson v. State, 75 Ark. 427, 88 S. W. 905; People v. Lee, 9 Cal. App. 590, 99 Pac. 1110; People v. Piner, 11 Cal. App. 542, 105 Pac. 780; People v. Wilson, 117 Cal. 688, 49 Pac. 1054; Wallace v. State, 41 Fla. 547, 26 South. 713; Robertson v. State, 40 Fla. 509, 24 South. 474; Alsobrook v. State, 126 Ga. 100, 54 S. E. 805; Hall v. State, 7 Ga. App. 115, 66 S. E. 390; State v. Lancaster, 10 Idaho, 410, 78 Pac. 1081; McDonald v. People, 25 Ill. App. 350; Glover v. People, 204 Ill. 170, 68 N. E. 464; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; Young v. United States, 7 Ind. Ter. 78, 103 S. W. 771; State v. Neubauer, 145 Iowa, 337, 124 N. W. 312; State v. Johnson, 133 Iowa, 38, 110 N. W. 170; State v. Chance, 82 Kan. 388, 20 Ann. Cas. 164, 27 L. R. A., N. S., 1003, 108 Pac. 789; McFarland v. State, 4 Kan. 68; Taylor v. Commonwealth, 92 S. W. 292, 294, 28 Ky. Law Rep. 1348, 1331; State v. Honore, 121 La. 573, 46 South. 655; State v. Munco, 12 La. Ann. 625; Archer v. State, 45 Md. 33; Commonwealth v. Bradford, 126 Mass. 42; Commonwealth v. Call, 21 Pick. (Mass.) 515; People v. Loomis, 161 Mich. 651, 126 N. W. 985; People v. Marble, 38

The intention with which a particular act is done constitutes often the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon his trial. For the purpose, therefore, of proving the intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from the like mental condition.⁸⁵ Bishop, in his work on Criminal Procedure, after giving various illustrations as to the proper application of this rule in criminal practice, sums up his conclusion in the following words: "It is, that though the prisoner is not to be

Mich. 117; *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *State v. Madigan*, 57 Minn. 425, 59 N. W. 490; *Rosetto v. Bay St. Louis*, 97 Miss. 409, 52 South. 785; *State v. Palmberg*, 199 Mo. 233, 116 Am. St. Rep. 476, 97 S. W. 566; *State v. Lee*, 228 Mo. 480, 128 S. W. 987; *State v. Myers*, 82 Mo. 558, 53 Am. Rep. 389; *State v. Braunschweig*, 38 Mo. 587; *Chamberlain v. State*, 80 Neb. 812, 115 N. W. 555; *Clark v. State*, 79 Neb. 482, 113 N. W. 804; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *People v. Hill*, 198 N. Y. 64, 91 N. E. 272; *People v. Weber*, 130 App. Div. 593, 115 N. Y. Supp. 453; *People v. Weinseimer*, 117 App. Div. 603, 102 N. Y. Supp. 579, 190 N. Y. 537, 83 N. E. 1129; *Osborne v. People*, 2 Park. Cr. (N. Y.) 583; *Vickers v. United States*, 1 Okl. Cr. 452, 98 Pac. 467; *State v. Smith*, 55 Or. 408, 106 Pac. 797; *State v. La Rose*, 54 Or. 555, 104 Pac. 299; *State v. Roberts*, 15 Or. 187, 13 Pac. 896; *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649; *State v. Talley*, 77 S. C. 99, 122 Am. St. Rep. 559, 11 L. R. A., N. S., 938, 57 S. E. 618; *State v. Allison*, 24 S. D. 622, 124 N. W. 747; *State v. Jackson*, 21 S. D. 494,

16 Ann. Cas. 87, 113 N. W. 880; *State v. Phelps*, 5 S. D. 480, 59 N. W. 471; *Tuller v. State*, 58 Tex. Cr. 571, 126 S. W. 1158; *Gorman v. State*, 52 Tex. Cr. 327, 106 S. W. 384; *Lynne v. State*, 53 Tex. Cr. 375, 111 S. W. 729; *Lampkin v. State*, 47 Tex. Cr. 625, 85 S. W. 803; *State v. Roby*, 83 Vt. 121, 74 Atl. 638; *State v. Louanis*, 79 Vt. 463, 9 Ann. Cas. 194, 65 Atl. 532; *State v. Marshall*, 77 Vt. 262, 59 Atl. 916; *Burr v. Commonwealth*, 4 Gratt. (Va.) 532, 534; *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768; *State v. Mobley*, 44 Wash. 549, 87 Pac. 815; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *Davis v. State*, 134 Wis. 632, 115 N. W. 150; *Horn v. State*, 12 Wyo. 80, 73 Pac. 705; *Bottomley v. United States*, 1 Story (U. S.), 135, Fed. Cas. No. 1688; *Wood v. United States*, 16 Pet (U. S.) 342, 10 L. Ed. 987; *United States v. Dexter*, 154 Fed. 890; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477; *Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142; *Rex v. Hurst*, 13 Manitoba, 584; *Reg. v. May*, 1 Cox C. C. 236.

⁸⁵ *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292.

prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible; and it is also admissible, if it really tends thus, as in the facts of most cases it does not, to prove the act itself."⁸⁶ Formerly there was a clear distinction made between two classes of cases: 1. Where the intent with which an alleged offense was committed is equivocal, and such intent becomes an issue at the trial, proof of the commission of other similar offenses, within certain reasonable limits, is admissible, as tending to throw light upon the intentions of the accused in doing the act complained of; 2. Where from the nature of the offense under inquiry, proof of its commission as charged carries with it the evident implication of a criminal intent, evidence of the perpetration, or attempted perpetration, of other like offenses will not be admitted.⁸⁷ That distinction does not appear to have been warranted, and the more modern law may be taken to be that, notwithstanding there may be other proof of intent in the case, rendering evidence of another crime unnecessary, yet the prosecution is not thereby debarred from making all the proof possible on the subject, and consequently, in such a case, may introduce evidence of the other crime. Such is the law as declared in a later Indiana case.⁸⁸ In that case the defendants were convicted of grand larceny in obtaining money by agreeing to give to the person from whom the money was obtained counterfeit money of five times the amount obtained, intending to steal it. Upon the trial, evidence of other similar offenses committed about the same time as the crime for which the defendant was on trial was admitted in evi-

⁸⁶ 1 Bish. Crim. Proc., § 1067.

⁸⁷ To this class of cases *Strong v. State*, *supra*, belongs, but the dissenting opinion in that case was practi-

cally upheld in *Crum v. State*, 148 Ind. 401, 47 N. E. 833.

⁸⁸ *Crum v. State*, *supra*.

dence. In affirming the conviction the court said: "In principle there can be no reason why in any case the intent with which an act was done may not be proved by competent and pertinent evidence, even though proof may thus incidentally be made of other offenses." Thus on trials for *uttering counterfeit bills* or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time,⁸⁹ for while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money. On an accusation for *receiving stolen property*, knowing it to have been stolen, evidence that the accused has frequently received similar articles under like circumstances from the same thief and stolen from the same person or place, knowing that they were stolen, is relevant to show guilty knowledge.⁹⁰ The same rule has been applied in actions for *conspiracy*; for example, where the proof tended to show that the accused and a deputy collector had conspired to defraud the revenue by entering goods at an undervaluation, evidence of other transactions in further-

⁸⁹ Commonwealth v. Stone, 4 Met. (Mass.) 43; Commonwealth v. Bigelow, 8 Met. (Mass.) 235; People v. Farrell, 30 Cal. 316; Commonwealth v. Price, 10 Gray (Mass.), 472, 71 Am. Dec. 668; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; People v. Motins, 10 N. Y. Supp. 130; Langford v. State, 33 Fla. 233, 14 South. 815. As to forgeries: People v. McGlade, 139 Cal. 66, 72 Pac. 600; State v. Prims, 113 Iowa, 72, 84 N. W. 980; Burlingim v. State, 61 Neb. 276, 85 N. W. 76; Howard v. State, 37 Tex. Cr. 494, 66 Am. St. Rep. 812, 36 S. W. 475; *Ex parte* Glaser, 176 Fed. 702, 100 C. C. A. 254; State v. O'Connell, 144 Iowa, 559, 123 N. W. 201; State v. Chance, 82 Kan. 388, 20 Ann. Cas. 134, 27 L. R. A., N. S., 1003, 108 Pac. 789.

⁹⁰ Copperman v. People, 56 N. Y. 591; Dunn's Case, 1 Moody C. C. 146; Coleman v. People, 58 N. Y. 555; State v. Ward, 49 Conn. 429; Kilrow v. Commonwealth, 89 Pa. 480; Shriedly v. State, 23 Ohio St. 130; Commonwealth v. Jenkins, 10 Gray (Mass.), 485; Piano v. State, 161 Ala. 88, 49 South. 803; Koerner v. State, 98 Ind. 7; People v. Zimmerman, 11 Cal. App. 115, 104 Pac. 590; State v. Feuerhaken, 96 Iowa, 299, 65 N. W. 299; Jeffries v. United States, 7 Ind. Ter. 47, 103 S. W. 761; State v. Habib, 18 R. I. 558, 30 Atl. 462; Hanks v. State, 55 Tex. Cr. 451, 117 S. W. 150; Sapir v. United States, 174 Fed. 219, 98 C. C. A. 227.

ance of the common enterprise was held relevant.⁹¹ On the same principle in trials for *embezzlement*, other previous acts of the defendant of a similar character so intimately connected with the one under investigation as to show common criminal intent are relevant.⁹² In a prosecution for unlawfully and willfully disturbing the peace and quiet of another and his family, offenses of a character similar to the one charged, committed by the defendant from one to three days prior to the commission of the offense charged, are admissible as showing that the acts committed by the defendant, which were claimed to constitute the offense charged, were not innocently or rightfully committed. The evidence was competent and relevant, though probably unnecessary.⁹³

§ 144 (143). *Same, continued.*—At one time a distinction was drawn between the relevancy of former acts of *adultery* and the acts of the parties leading up to the consummation of the offense, but the weight of decisive authority now is that on the issue of adultery evidence of other acts of adultery, or of familiarity between the same persons is relevant to show the adulterous disposition of the parties at the time of the act of which complaint was made.⁹⁴ The distinction also existed between acts prior

⁹¹ *Bottomley v. United States*, 1 Story, 135, Fed. Cas. No. 1688. The same rule holds good in conspiracy for fraudulent purchase of goods: *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, and note; *Rex v. Roberts*, 1 Camp. 399; *Packer v. United States*, 106 Fed. 906, 46 C. C. A. 35.

⁹² *Commonwealth v. Tuckerman*, 10 Gray (Mass.), 173; *Commonwealth v. Shepard*, 1 Allen (Mass.), 575; *Rex v. Ellis*, 6 Barn. & C. 145, 108 Eng. Reprint, 406; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498; *State v. Holmes*, 65 Minn. 230, 68 N.

W. 11; *Brown v. State*, 18 Ohio St. 496; *Chamberlain v. State*, 80 Neb. 812, 115 N. W. 555; *State v. Hight*, 150 N. C. 817, 63 S. E. 1043; *Gassenheimer v. United States*, 26 App. D. C. 432; *Lawshe v. State*, 57 Tex. Cr. 32, 121 S. W. 865; *State v. Nilson*, 56 Wash. 289, 105 Pac. 829; *Walsh v. United States*, 174 Fed. 615, 98 C. C. A. 461.

⁹³ *State v. Burns*, 35 Kan. 387, 11 Pac. 161.

⁹⁴ *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346. In another county: *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, and note. In another state: *Common-*

and subsequent to the date of an offense charged.⁹⁵ In the case last cited, which was a suit for divorce on the ground of adultery, it was held that evidence of subsequent acts of adultery with the person named in the bill, committed outside the commonwealth, was admissible to show the nature of their relations at the time charged. Colt, J., delivering the opinion, said that the evidence should be admitted as tending to show that there existed between the parties an adulterous disposition. This disposition, said he, "is commonly of gradual development; it must have some duration, and does not suddenly subside. Whence, once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. The rule is, that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance until the contrary be shown."⁹⁶ And so with other offenses—those called sexual offenses—evidence of prior acts of the same character has repeatedly been held admissible, although such prior act is, in and of itself, a crime.⁹⁷ For prosecution of a *rape* or attempt to commit rape it is the prevailing rule that evidence of previous attempts by the accused to commit the crime upon the same person is admissible, but evidence of such attempts upon

wealth v. Merriam, 14 Pick. (Mass.) 518, 25 Am. Dec. 420, and note.

⁹⁵ Thayer v. Thayer, *supra*. Citing Commonwealth v. Merriam, *supra*.

⁹⁶ See, also, Anonymous, 3 Abb. N. C. (N. Y.) 161; Dodge v. Rush, 28 App. D. C. 149, 8 Ann. Cas. 671; Commonwealth v. Durfee, 100 Mass. 146; Commonwealth v. Pierce, 11 Gray (Mass.), 447; State v. Wallace, 9 N. H. 515; Commonwealth v. Lahey, 14 Gray (Mass.), 91;

McLeod v. State, 35 Ala. 395; State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124; Pond v. Pond, 132 Mass. 219; Conway v. Nicol, 34 Iowa, 533; Brooks v. Brooks, 145 Mass. 574, 1 Am. St. Rep. 485, 14 N. E. 777; Foulks v. Archer, 31 N. J. L. 58. See, also, the discussion on Thayer v. Thayer, *supra*, in 62 L. R. A., referred to at page 330.

⁹⁷ Note to People v. Molineux, *supra*, in 62 L. R. A., at page 330.

others is rejected. We can quite see that a sharp distinction must be observed between the major and the minor offense. The question of intent cannot be raised at all in the former case, but in that of assault with intent, there appears to be no good reason why evidence of similar attempts should be excluded. A man who has formed the plan of attempting the chastity of women, and carried it into effect by a series of crimes can be and should be no more protected than the one who has planned to financially victimize the inhabitants of a locality. The authorities are nevertheless divided, some holding that acts of the accused with others are not admissible. In California the courts rigorously exclude such evidence. In that state, upon the trial of a person charged with an assault with intent to commit rape upon a young girl under fourteen years of age, evidence tending to show lewd, immoral, and indecent conduct of the defendant with other young girls, and tending to show lewd acts and occurrences between the defendant and such other girls, and endeavors to corrupt them, is inadmissible, and the admission of such evidence is ground of reversal.⁹⁸ And on an information for enticing a girl into a house for purposes of prostitution, the court has held that the evidence of other young girls that the defendant had asked each of them to her house to have illicit intercourse with men, is inadmissible; and the admission of such evidence for the prosecution is prejudicially erroneous, and requires the reversal of a judgment of con-

⁹⁸ The general rule is well settled that the prosecution cannot prove the commission by the defendant of other like offenses, for the purpose of increasing the likelihood that he committed the particular offense with which he was charged, though in some exceptional cases proof of other acts is allowed in order to show the *intent* with which the act charged was done; but this exception does not apply to the case of an assault with intent to

commit rape upon a female child under the age of fourteen years: *People v. Stewart*, 85 Cal. 174, 24 Pac. 722. On a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate: *People v. Bowen*, 49 Cal. 654.

viction.⁹⁹ Wisconsin is responsible for the peculiar view expressed by Winslow, J.¹⁰⁰ On a trial for assault with intent evidence was given of a similar assault on another woman living three blocks distant from the prosecutrix one hour previously. After stating the rule in rape cases and citing Wharton that evidence of prior sexual assaults on the prosecutrix is admissible, though not of rapes on other persons,¹ the learned judge said: "If this be the rule as to rape actually committed, it would seem to apply to mere unsuccessful assaults, where the purpose does not clearly appear, with equal, if not greater, force. There may be a number of motives for the commission of an assault besides rape,—such as robbery, revenge, and the like,—and it can hardly be logically argued that because a man has assaulted two women, although the assaults were both on the same day, the same motive impelled both assaults." This reasoning does not appeal to us. The question of intent can hardly be raised in rape without presupposing the *reductio ad absurdum* of the defense being the absence of intent. On the other side we find Robinson, C. J., thus stating the law of Iowa,² on a trial for assault with intent, where error was alleged in receiving evidence of indecencies perpetrated on other young girls at about the same time. "Proof of some other felony, committed at a different time and upon or against another person, and having no connection with the crime charged, is not admissible."³ There are exceptions to the rule thus stated, as where knowledge and intent constitute a necessary element of the offense charged.⁴ We are of opinion that the testimony in controversy falls within the exception to the general rule, if it may not be

⁹⁹ *People v. Elliott*, 119 Cal. 593, 51 Pac. 955. The facts in *State v. Durr*, 39 La. Ann. 751, 2 South. 546, show that case cited in support was essentially different; and *Owens v. State*, 39 Tex. Cr. 391, 46 S. W. 240, was an indictment for the major crime.

¹⁰⁰ *McAllister v. State*, 112 Wis. 496, 88 N. W. 212.

¹ Whart. Cr. Ev., 9th ed., § 46.

² *State v. Desmond*, 109 Iowa, 72, 80 N. W. 214.

³ *State v. Walters*, 45 Iowa, 389. See, also, *State v. Saunders*, 68 Iowa, 370, 27 N. W. 455.

⁴ *State v. Jamison*, 74 Iowa, 613, 38 N. W. 509; *State v. Stice*, 88 Iowa, 27, 55 N. W. 17.

regarded as direct evidence of the offense charged. The acts of the defendant towards each girl, although in some respects separate and distinct from his acts towards each of the others, were, in a sense, parts of a single transaction, and proof of the whole was important to show the intent with which he acted towards each girl." The weight of authority is clearly in favor of the exclusion of such testimony, but we cannot admit the soundness on that account. While acts remote as to time should not be allowed to prejudice the cause of one accused, yet when similar acts, near either as to time, locality or circumstance can be proved, their exclusion does not appeal to the logic of relevancy, which appears imperatively to call for their consideration by the jury. Nor do we think the opinion of Cushing, C. J., in the famous New Hampshire case before cited,⁵ does otherwise than strengthen our view. He said: "We may state the law in the following propositions: 1. It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. 2. It is not permitted to show the defendant's bad character by showing particular acts. 3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. 4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. . . . The law in regard to proof of intent, is, I apprehend, in no particular different from the law in regard to the proof of other facts, unless it may be in the general principle that a person is ordinarily presumed to intend the natural consequences of his actions. But always the evidence will be subject to the condition that it legally and logically tends to prove the facts in issue, whether it be the intent or any other fact. . . . But however extreme the

⁵ State v. Lapage, 57 N. H. 289.

case may be, I think it will be found that the courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other." It will be observed that the learned judge uses the words "tendency or disposition," and expressly refrains from using such expressions as would indicate that facts illustrative of set design or purpose should be excluded. That a man who commits a series of similar crimes has a tendency or disposition to commit that kind of crime is undoubted, and evidence tendered in that aspect might be inadmissible, but it is quite a different thing when he has the design of committing them from the beginning, in which case the evidence of the intent which would not be entirely accomplished until his evil purpose was fulfilled, should not be excluded. On a charge of *arson* it is relevant to show that the defendant had made other attempts to set fire to the buildings in question, when such attempts were sufficiently near to the time of the commission of the offense charged to justify the inference that the defendant then had a settled purpose to commit the offense.⁶ And it is well settled that evidence of confessions with regard to the particular offense charged and which cover also other incendiary fire by the same prisoner is relevant.⁷ In a

⁶ *Commonwealth v. Bradford*, 126 Mass. 42; *Commonwealth v. McCarthy*, 119 Mass. 354; *Reg. v. Long*, 6 Car. & P. 179; *Reg. v. Cobden*, 3 Fost. & F. 833; *Reg. v. Dossett*, 2 Car. & K. 306, 2 Cox C. C. 243 (fire at same place previous day); *Reg. v. Taylor*, 5 Cox C. C. 138 (prisoner's presence at other fires same night); *Reg. v. Bailey*, 2 Cox C. C. 311 (previous abortive fires in same place); *Reg. v. Regan*, 4 Cox C. C. 335 (other fires given notice of by prisoner); *Reg. v. Grant*, 4 Fost. & F. 322; *Reg. v. Harris*, 4 Fost. & F. 342; *Reg. v. Gray*, 4 Fost. & F. 1102; *Knights v. State*, 58

Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328; *People v. Kennedy*, 32 N. Y. 141; *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846; *State v. Thompson*, 97 N. C. 496, 1 S. E. 921; *Kramer v. Commonwealth*, 87 Pa. 299; *State v. Hallock*, 70 Vt. 159, 40 Atl. 51.

⁷ *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680. (The court, however, should have permitted the confession of defendant that he burned Wadley's house that same night as a part of the same scheme, and also that he took Hodge's horse.

Massachusetts case of arson, where there was evidence of the defendant having set fire to the same premises a few nights before, which was discovered and extinguished by a neighbor, the court said: "The evidence was competent on the question of the intent with which the defendant subsequently burned the building, and committed the offense for which he was then tried. It was carefully limited to the single purpose for which it was competent. The unsuccessful attempt to do the same thing, a few days before, was evidence that the burning was willful and intentional, and not the result of accident or negligence on the part of the defendant. It was sufficiently near to the time of the commission of the offense charged, to justify the inference that the defendant then had a settled purpose in regard to it." The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is, that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge.⁸ A very strong case comes from New York, in which a discharged servant was charged with arson. The

Evidence of other crimes is admissible, where it tends to prove the one under investigation. This is now well established law: *People v. Jones*, 123 Cal. 65, 55 Pac. 698.)

⁸ *Commonwealth v. Bradford*, 126 Mass. 42. (It is a rule of criminal law, that evidence tending to prove a

similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not admissible. But there was no invasion of this rule in the admission of this evidence.)

people were permitted to prove, under defendant's objection, that upon the night of the fire and before it occurred, a span of horses and a pony and cow, kept in the barn and belonging to the owner, were poisoned with London Purple and all died shortly afterward; that his carriage in the same barn was hacked and the curtains and cushions cut into shreds; that his carriages and cutters in the adjoining carriage-house were cut and damaged; but his brother's carriages and cutters in the same barn were not injured. The evidence was sufficient to support the inference that the malicious injury to the personal property was done upon the same night that the fire occurred and by the incendiary, and as a part of the same criminal scheme which resulted in the destruction of the barn. Under such circumstances the evidence was competent.⁹ It very clearly tended to prove that the fire was not accidental; that its origin was instigated by malice and not from the desire of gain; that it was kindled by some person having the intimate knowledge of the defendant in regard to the situation of the property, and it was properly received, even though it may have tended to establish the defendant's guilt of another crime than the one set forth in the indictment on trial.¹⁰ There has been considerable discussion whether, on the criminal charge of obtaining goods or money on *false pretenses*, it is relevant to show that the defendant has made other similar pretenses at another time and place. While it has been held in some courts that such evidence is irrelevant,¹¹ yet by the weight of authority evidence of such other representations or transactions is received, when they show a common motive or intent and when the transactions are so connected in point of time and so similar in their other relations that the same motive may reasonably be imputed to all.¹² So courts have received evidence of *other*

⁹ Hope v. People, 83 N. Y. 427, 38 Am. Rep. 460.

¹⁰ People v. Murphy, 135 N. Y. 450, 32 N. E. 138.

¹¹ Strong v. State, 86 Ind. 208, 44 Am. Rep. 292, and full note; Reg. v.

Holt, Bell's C. C. 280. See, also, Commonwealth v. Jackson, 132 Mass. 16, and § 142, *ante*.

¹² Mayer v. People, 80 N. Y. 364; People v. Shulman, 80 N. Y. 373; Tregdon v. Commonwealth, 31 Gratt

offenses, when so connected as to form part of one entire transaction or a connected plan, in prosecutions for robbery,¹³ larceny,¹⁴ burglary,¹⁵ extortion,¹⁶ abortion,¹⁷ gambling,¹⁸ keeping a lottery,¹⁹ and fraudulent voting.²⁰ Applying the same principle the courts have often received evidence of other similar offenses in the trial of indict-

(Va.) 862; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, and note. See, also, Commonwealth v. Jackson, 132 Mass. 16, and § 142, *ante*.

¹³ Rex v. Ellis, 6 Barn. & C. 145, 108 Eng. Reprint, 406; Rex v. Winkworth, 4 Car. & P. 444; Commonwealth v. Scott, 123 Mass. 222, 25 Am. Rep. 81; State v. Spray, 174 Mo. 569, 74 S. W. 846; Hope v. People, 83 N. Y. 419, 38 Am. Rep. 460.

¹⁴ Endaily v. State, 39 Ark. 278; People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; Housh v. People, 24 Colo. 262, 50 Pac. 1036; Baldwin v. State, 46 Fla. 115, 35 South. 220; Johnson v. State, 148 Ind. 522, 47 N. E. 926; State v. Thomas, 30 La. Ann. 600; State v. Southall, 77 Minn. 296, 79 N. W. 1007; State v. Phillips, 160 Mo. 503, 60 S. W. 1050; Barton v. State, 18 Ohio, 221; Beberstein v. Territory, 8 Okl. 467, 58 Pac. 641; State v. Savage, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128; People v. Hurlburt, 92 Hun, 46, 36 N. Y. Supp. 867; People v. Hughes, 91 Hun, 354, 36 N. Y. Supp. 493; Shipplly v. People, 86 N. Y. 375, 40 Am. Rep. 551; People v. Dowling, 84 N. Y. 479; Kilrow v. Commonwealth, 89 Pa. 480; McIver v. State (Tex. Cr.), 60 S. W. 50; Brown v. State (Tex. Cr.), 59 S. W. 1118; Robinson v. State (Tex. Cr.), 48 S. W. 176; Ware v. State, 36 Tex. Cr. 597, 38 S. W. 198; Conley v. State, 21 Tex. App. 495, 1 S. W. 454; Cameron v. State, 9 Tex. App. 332; White v. State, 11 Tex. 769; State v. Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203;

Rex v. Ellis, 6 Barn. & C. 145, 108 Eng. Reprint, 406; Rex v. Bleasdale, 2 Car. & K. 765.

¹⁵ Frazier v. State, 135 Ind. 38, 34 N. E. 817; Thomas v. Commonwealth, 1 Ky. Law Rep. 122; State v. Johnson, 38 La. Ann. 686; Commonwealth v. Day, 138 Mass. 186; State v. Franke, 159 Mo. 535, 60 S. W. 1053; State v. Cowell, 12 Nev. 337; Osborne v. People, 2 Park. Cr. Rep. (N. Y.) 583; State v. Hahn, 8 Ohio N. P. 101; Hunt v. State (Tex. Cr.), 60 S. W. 965; Long v. State (Tex. Cr.), 47 S. W. 363; Ware v. State, 36 Tex. Cr. 597, 38 S. W. 198; State v. Valwell, 66 Vt. 558, 29 Atl. 1018; State v. Norris, 27 Wash. 453, 67 Pac. 983.

¹⁶ Glover v. People, 204 Ill. 170, 68 N. E. 464; State v. Lewis, 96 Iowa, 286, 65 N. W. 295; Wallace v. State, 41 Fla. 547, 20 South. 713.

¹⁷ Scott v. People, 141 Ill. 195, 30 N. E. 329; Lamb v. State, 66 Md. 285, 7 Atl. 399; Commonwealth v. Corkin, 136 Mass. 429; People v. Abbott, 116 Mich. 263, 74 N. W. 529; People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; Reg. v. Calder, 1 Cox C. C. 348; Reg. v. Dale, 16 Cox C. C. 703.

¹⁸ Commonwealth v. Ferry, 146 Mass. 209, 15 N. E. 484; Toll v. State, 40 Fla. 169, 23 South. 942.

¹⁹ Clark v. State, 47 N. J. L. 556, 4 Atl. 327; Miller v. Commonwealth, 13 Bush (Ky.), 737; Thomas v. People, 59 Ill. 162.

²⁰ People v. Shea, 147 N. Y. 78, 41 N. E. 505.

ments for homicide or homicidal assaults, as tending to show a deliberate plan or to repel the inference of accident.²¹

§ 145 (144). Same — Such evidence, how limited.—In the necessarily curtailed discussion on the aspect of the criminal law displayed in the preceding two sections, an effort has been made to broadly mark the dividing line between evidence to support the indictment, the commission of the offense itself and evidence designed to prove *quo animo* the offense was committed by the accused; and it will have been observed that in the many cases which have been cited on the subject under discussion, the familiar principle is recognized that evidence tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not relevant. Such evidence is only allowed to show the *knowledge or intent* of the party or to *repel* the inference of *accident*, and then only when the proof shows such a connection between the different transactions as raises a fair inference of a common motive in each.²² The preceding sections have been devoted to an effort to keep well distinguished the rule and its exceptions, and in summarizing those sections we shall endeavor to emphasize it. The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.²³ This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out

²¹ Zoldoske v. State, 82 Wis. 580, 52 N. W. 778; People v. Wilson, 117 Cal. 688, 49 Pac. 1054; State v. Merkley, 74 Iowa, 695, 39 N. W. 111; State v. Roper, 141 Mo. 327, 42 S. W. 935;

People v. Jones, 99 N. Y. 667, 2 N. E. 49.

²² See cases already cited.

²³ 1 Bishop, New Crim. Proc., § 1120.

the exceptions thereto.²⁴ The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.²⁵ First, as to motive: It is obvious that in every criminal trial, when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged. And when evidence of extraneous crimes has been held

²⁴ "The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded": *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319. "It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one": *Coleman v. People*, 55 N. Y. 81. "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a

variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him": *Commonwealth v. Jackson*, 132 Mass. 16, and note thereto. "It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty": *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649.

²⁵ Wharton, *Crim. Ev.*, 9th ed., § 48; Underhill, *Ev.*, § 58; Abbott, *Trial Brief, Crim. Trials*, § 598.

competent upon the existence of motive, it has been either the specific motive which underlay the particular crime charged, or a motive common to all of the crimes sought to be proved. Second, as to intent: In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proved to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. As we have shown, the intent in such crimes as rape may be inferred from the act itself, but there are others where the intent, the guilty knowledge or the *scienter* must be proved before a conviction can be had, such as those of which instances have been given. Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the accused are received in the classes of cases referred to. Third, as to the possibility of mistake or accident, or doubt as to the cause of death: There are cases in which the possible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution, or in which the doubtful cause of the particular death may be established by other previous similar deaths.²⁶ Fourth, as to a common plan or scheme: It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and

²⁶ Most of these are poisoning cases, and are dealt with in § 147, *post*, and at length in *People v. Molineux*, 168 N. Y. 264, 62 L. R. A. 193,

61 N. E. 286, from the erudite opinion wherein of Werner, J., containing this excellent division of the exceptions to the rule, we have adapted the text.

composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Fifth, as to identity: Another exception to the general rule is that, when the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. Some of those in which it has are appended in the note hereto.²⁷ In most of the cases cited, the fact, apparently collateral, occurred at about the same time as the principal fact in question. But if the fact offered is otherwise relevant, it is immaterial whether it occurred be-

²⁷ In *People v. Rogers*, 71 Cal. 565, 12 Pac. 679, the defendant was convicted of a murder committed by him while burglariously entering the house of the deceased. Evidence was received tending to show that the defendant had committed a prior burglary at which he had stolen a knife and chisel, and still another burglary at which he had stolen a pistol. The evidence also tended to show that the burglary at the house of the deceased had been committed by means of the knife and chisel, and that the deceased had been killed with the pistol which the defendant had previously stolen. It will be seen at once that there was such a palpable connection between the several crimes referred to that the identification of the means used in the commission of the crime charged, while incidentally proving the defendant guilty of other crimes, also directly identified him as the person who was guilty of the murder. In *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460, a robbery committed by a masked man was followed by burglary of a bank. The janitor of the bank had been robbed of the key thereto by these men. Evidence of the burglary was held proper to identify

those known to have been implicated therein with the persons who had committed the robbery. In *Rex v. Clewes*, 4 Car. & P. 221, a *nisi prius* case, imperfectly reported, there was a question of identity. A. was indicted for the murder of H. The theory of the prosecution was that A., having malice against P., hired H. to murder him; that H. having committed the murder, but having been detected in the act, A. murdered H. to prevent the discovery of his (A.'s) guilt. In each of the last two cases there was an immediate and direct connection between the crime charged and the extraneous crime proved. In the first case burglary of the bank, by men who were known, with the key of which the janitor had been robbed, directly identified the burglars as the masked men who but a moment before committed the robbery which was charged in the indictment. In the second case, proof that the defendant hired H. to murder P., and that H. was detected in the act, was cogent evidence that the same man who had hired the assassin had a motive for getting rid of him when his confession seemed imminent.

fore or after the one under investigation. And in some of the cases there had been an interval of several months; each case, as to the application of this rule, must depend largely upon its own circumstances and not infrequently the limit must rest largely in the discretion of the judge presiding at the trial.²⁸ The real test is that the evidence should be sufficiently significant in character, and sufficiently near in point of time, to have a tendency to lead the guarded discretion of a reasonable and just man to belief in the intent or motive sought to be proved.²⁹

§ 146 (145). **Collateral facts to show good faith—Knowledge, threats, etc.**—So far the collateral facts dealt with were such as often accompany acts of *mala fides*, and most of the illustrations which have been given under this head have been instances in which it was the object to prove malice, intent, bad faith or guilty knowledge. But of course, on the same principle, facts apparently collateral may be proved, if they show *good faith* or prudence or the knowledge or information on which a person has acted when such fact is in issue. These instances occur most frequently in cases of assignments for the benefit of creditors, the good faith of the holder of a bill or note, and of vendors and purchasers. Thus in an action for fraudulent representations as to the solvency of a person, the defendant may show, as bearing on his good faith, the general repute as to the solvency of such person at the time the representations were made.³⁰ And in cases of assignments for the benefit of creditors a deed apparently valid may be attacked for circumstances surrounding the making of it. The good faith which is necessary to support it is then a vital part of the proof, to rebut the presumption of fraud.³¹ The rule is that the transactions between hus-

²⁸ *Mayer v. People*, 80 N. Y. 364, 373, note; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, and note.

²⁹ *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, and note. See,

also, extended note to *Strong v. State* (86 Ind. 208), 44 Am. Rep. 299, 308.

³⁰ *Skeen v. Bumpstead*, 1 Hurl. & C. 358.

³¹ *Dews v. Cornish*, 20 Ark. 332; *Layson v. Rowan*, 7 Rob. (La.) 1;

band and wife are to be strictly scrutinized, and if there are even slight circumstances going to impeach the *bona fides* of the transaction, the burden of proof is thrown upon those claiming under it, to establish the fairness and validity of the transaction. Coupled with this is the rule that when suspicious circumstances are shown against the fairness of the transaction, and the party required to explain it, if fair, fails to produce proof to establish its fairness, the presumption is that the transaction was unfair, or that it is to be taken against its fairness.³² As to commercial paper, the question, as often directly as collaterally, arises where the good faith of a transferee or holder of a bill or note is challenged. The original presumption of good faith in the taking of the bill or note may be ousted,³³ and it then devolves upon the holder to establish his good faith;³⁴ and this necessity will be found in all similar actions wherever

Pitts Agricultural Works v. Amelser, 87 Md. 493, 40 Atl. 56; State v. Keeler, 49 Mo. 548; Wilson v. Harris, 21 Mont. 374, 54 Pac. 46, 19 Mont. 69, 47 Pac. 1101; Shultz v. Hoagland, 85 N. Y. 464; Hodges v. Lassiter, 96 N. C. 351, 2 S. E. 923; Landauer v. Conklin, 3 S. D. 462, 54 N. W. 322; Washington v. Ryan, 5 Baxt. (Tenn.) 622; Bates v. Simmons, 62 Wis. 69, 22 N. W. 335; Means v. Montgomery, 23 Fed. 421.

³² Estes v. Spain, 19 Fed. 714.

³³ First Nat. Bank v. Trognitz, 14 Cal. App. 176, 111 Pac. 402; Johnson County etc. Bank v. Walker, 80 Conn. 509, 69 Atl. 15; Kaley v. Musgrave, 26 Ill. App. 509; Johnson County etc. Bank v. Capito (Ind. App.), 94 N. E. 797; French v. Gordon, 10 Kan. 370; Lyon v. Martin, 31 Kan. 411, 2 Pac. 790; Alexander v. Springfield Bank, 2 Met. (Ky.) 534; Norton v. Heywood, 20 Me. 359; Hutchinson v. Moody, 18 Me. 393; Lucas v. Byrne, 35 Md. 485; Bennett v. Tolina, 56 Mo. 309; Greer v. Yosti, 56 Mo. 307; Johnson v. Noble Mach. Co.,

144 Mo. App. 436, 129 S. W. 271; Corby v. Butler, 55 Mo. 398; Horton v. Bayne, 52 Mo. 531; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Morehead Bank v. Hernig, 220 Pa. 224, 69 Atl. 679; Atlas Bank v. Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219; National Bank v. Chatfield, 118 Tenn. 481, 489, 10 L. R. A., N. S., 801, 101 S. W. 765; Duerson v. Alsop, 27 Gratt. (Va.) 229; Moyses v. Bell, 62 Wash. 534, 114 Pac. 193; Cook v. Helms, 5 Wis. 107.

³⁴ Waldon v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127; Richmond v. Diefendorf, 51 Hun (N. Y.), 537, 4 N. Y. Supp. 375; Worcester County Bank v. Dorchester etc. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; Wyer v. Dorchester etc. Bank, 11 Cush. (Mass.) 51, 59 Am. Dec. 137; Cummings v. Thompson, 18 Minn. 246; Devlin v. Clark, 31 Mo. 22; Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 60 Am. Rep. 443, 12 N. E. 577; Robinson v. Hodgson, 73 Pa. 202.

the good faith of the party has been attacked and is material to the issue. The same principle is often illustrated in actions for *homicide*, where proof is allowed of threats made by the deceased against the accused and communicated to him for the purpose of showing that he had reasonable ground to fear violence, and to show that he acted in self-defense.³⁵ In a case of homicide after threats, Chief Justice Fuller³⁶ said: "Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause for apprehension of danger and reason for promptness to repel attack, but they could not have been admitted on a record such as this, if offered by the prosecution as tending to show spite, ill-will, or grudge on the part of the person threatened; nor could they, being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction. The logical inference was that these threats excited apprehension, and another and inconsistent inference could not be arbitrarily substituted." So that as to communicated threats the law is that evidence of them is relevant if the preliminary showing—that is, acts of the deceased threatening immediate danger to the accused or tending to show self-defense—is established.³⁷ And it has

³⁵ *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49, and note, with full discussion of the subject; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 South. 632.

³⁶ *Allison v. United States*, 160 U. S. 203, 40 L. Ed. 395, 16 Sup. Ct. Rep. 252.

³⁷ *Ridgell v. State* (Ala.), 55 South. 327; *Martin v. State*, 144 Ala.

8, 40 South. 275; *Oates v. State*, 156 Ala. 99, 47 South. 74; *Dunn v. State*, 143 Ala. 67, 39 South. 147; *Brooks v. State*, 85 Ark. 376, 108 S. W. 205; *Black v. State*, 84 Ark. 121, 104 S. W. 1104; *Burton v. State*, 82 Ark. 595, 102 S. W. 362; *Lee v. State*, 72 Ark. 436, 81 S. W. 385; *People v. Thompson*, 92 Cal. 506, 28 Pac. 589; *People v. Tamkin*, 62 Cal. 468; *People*

been held that even where there was no imminent danger, the evidence is admissible, but the weight of authority is, and we think properly, the other way.³⁸ There can be no doubt that it is the overt act coupled with the previous threat, or the placing of the accused in such imminent danger as the threat implied, which alone can be relied on for justification; and the danger of the doctrine that a communicated threat *per se* would justify a homicide would be as pernicious in its effects as its adoption would be opposed to the best canons of the criminal law. Where would its advocates draw the line as to time? The deceased may not have been reported truly in the threat. There are

v. Travis, 56 Cal. 251; Warford v. People, 41 Colo. 203, 92 Pac. 24; Lester v. State, 37 Fla. 382, 20 South. 232; Monroe v. State, 5 Ga. 85; McCoy v. People, 175 Ill. 224, 51 N. E. 777; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Enlow v. State, 154 Ind. 664, 57 N. E. 539; State v. Butler, 146 Iowa, 285, 125 N. W. 196; State v. Sullivan, 51 Iowa, 142, 50 N. W. 572; State v. Collins, 32 Iowa, 36; State v. Burton, 63 Kan. 602, 66 Pac. 633; State v. Scott, 24 Kan. 68; Ware v. Commonwealth, 140 Ky. 534, 131 S. W. 269; Young v. Commonwealth, 19 Ky. Law Rep. 929, 42 S. W. 1141; State v. Miller, 125 La. 254, 51 South. 189; State v. Bouvy, 124 La. 1054, 50 South. 849; State v. Coleman, 119 La. 669, 44 South. 338; State v. Lindsay, 122 La. 375, 47 South. 687; Brownell v. People, 38 Mich. 732; State v. Dee, 14 Minn. 35; Johnson v. State (Miss.), 27 South. 880; State v. Kennedy, 207 Mo. 528, 106 S. W. 57; State v. King, 203 Mo. 560, 102 S. W. 515; State v. Brown, 63 Mo. 439; State v. Birks, 199 Mo. 263, 97 S. W. 578; State v. Smith, 164 Mo. 567, 65 S. W. 270; State v. Hanlon, 38 Mont. 557, 100 Pac. 1035; State v. Felker, 27 Mont. 451, 71 Pac. 668; State v. Shadwell, 22 Mont. 559, 57

Pac. 281; Basye v. State, 45 Neb. 261, 63 N. W. 811; People v. Taylor, 177 N. Y. 237, 69 N. E. 534; People v. Gaimari, 176 N. Y. 84, 68 N. E. 112; State v. Baldwin, 155 N. C. 212, 71 S. E. 212; State v. Byrd, 121 N. C. 684, 28 S. E. 353; Offit v. State, 5 Okl. Cr. 48, 113 Pac. 554; Reed v. State, 2 Okl. Cr. 589, 103 Pac. 1042; Morris v. Territory, 1 Okl. Cr. 617, 99 Pac. 760, 101 Pac. 111; State v. Horseman, 52 Or. 572, 98 Pac. 135; State v. Dodson, 4 Or. 64; Commonwealth v. Lenox, 3 Brewst. (Pa.) 249; Fitzhugh v. State, 8 Tenn. 258; Hull v. State, 74 Tenn. 249; Burnam v. State (Tex. Cr.), 133 S. W. 1045; Simpson v. State, 48 Tex. Cr. 328, 87 S. W. 826; Glover v. State (Tex. Cr.), 107 S. W. 854; St. Clair v. State, 49 Tex. Cr. 479, 92 S. W. 1095; Lewis v. Commonwealth, 78 Va. 732; State v. Cushing, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Wallace v. United States, 162 U. S. 466, 40 L. Ed. 1039, 16 Sup. Ct. Rep. 859; Allison v. United States, 160 U. S. 203, 40 L. Ed. 395, 16 Sup. Ct. Rep. 252; Reg. v. Weston, 14 Cox C. C. 346.

³⁸ State v. Abbott, 8 W. Va. 741.

many arguments and authorities in favor of its exclusion, and comparatively but few the other way. Long, C. J., in a New Mexico case,³⁹ said: "It is not doubted, where there is any evidence which tends to show, even in the slightest degree, that the deceased at the time of the killing was advancing in a threatening manner on the defendant, or occupied a menacing attitude towards him, or made the slightest move towards attack, or did any act indicating a present intent to do defendant great bodily harm, that in such cases evidence of prior threats by deceased against the prisoner, and communicated to him, would be competent evidence to be weighed by the jury. The courts should be careful about excluding evidence of this character, and may do so only when there is an entire absence of such circumstances. If there is even slight evidence to indicate that the act of killing was done under a present, reasonable apprehension to himself of great bodily harm, prior threats should not be excluded." Wharton says:⁴⁰ "Certainly, if such evidence is offered to prove that defendant had a right to kill the deceased, there being no proof of hostile demonstration by the deceased, then it is irrelevant. No man has a right to take another's life if, by appealing to the law, he can avoid the encounter; for if A. threatens B.'s life, and the threat is known to B., his duty is to have A. arrested by due process of law, not to shoot him. On the other hand, if the question is as to which party is the assailant, then it is admissible to prove by prior declarations of either that the attack was one he intended to make. If defendant knew beforehand that his life was threatened, he should have applied to the law for redress." Even when the *threats* were *not communicated* to the defendant they may be proved when self-defense is the defense, as tending to show that the deceased was in fact the aggressor. "Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner to-

³⁹ *Thomason v. Territory*, 4 N. M. 150, 13 Pac. 223.

⁴⁰ Wharton on Homicide, §§ 694, 695.

wards the deceased when homicide occurred; uncommunicated threats are evidence of the mental attitude of the deceased toward the prisoner."⁴¹ They can be used also to show who began the affray and to corroborate evidence of communicated threats.⁴² For any of these purposes such evidence is always relevant.⁴³ And in such cases the

⁴¹ *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *People v. Arnold*, 15 Cal. 481; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Roberts v. State*, 68 Ala. 156, 163; *Wilson v. State*, 30 Fla. 242, 17 L. R. A. 654, 11 South. 556; *May v. State*, 90 Ga. 793, 17 S. E. 108; *Young v. Commonwealth*, 19 Ky. Law Rep. 929, 42 S. W. 1141; *Johnson v. State*, 54 Miss. 430; *State v. Smith*, 164 Mo. 567, 65 S. W. 270; *State v. Tarter*, 26 Or. 38, 37 Pac. 53; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *Wiggins v. People*, 93 U. S. 465, 23 L. Ed. 941.

⁴² *Territory v. Hall*, 10 N. M. 545, 62 Pac. 1083.

⁴³ *Howard v. State (Ala.)*, 55 South. 255; *Crumpton v. State*, 167 Ala. 4, 52 South. 605; *Turner v. State*, 160 Ala. 40, 49 South. 828; *Wilson v. State*, 140 Ala. 43, 37 South. 93; *Pitman v. State*, 22 Ark. 354; *People v. Farley*, 124 Cal. 594, 57 Pac. 571; *People v. Tamkin*, 62 Cal. 468; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Davidson v. People*, 4 Colo. 145; *Wilson v. State*, 30 Fla. 234, 17 L. R. A. 654, 11 South. 556; *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027; *Pittman v. State*, 92 Ga. 480, 17 S. E. 856; *May v. State*, 90 Ga. 794, 17 S. E. 108; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Neathery v. People*, 227 Ill. 110, 81 N. E. 16; *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *Duncan v. State*, 171 Ind. 444, 86 N. E. 641; *Leverich*

v. State, 105 Ind. 277, 4 N. E. 852; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *Helms v. United States*, 2 Ind. Ter. 595, 52 S. W. 60; *State v. Blee*, 133 Iowa, 725, 111 N. W. 19; *State v. Helm*, 92 Iowa, 540, 61 N. W. 246; *State v. Elliott*, 45 Iowa, 486; *State v. Spendlove*, 44 Kan. 1, 24 Pac. 67; *State v. Brown*, 22 Kan. 222; *Hargis v. Commonwealth*, 135 Ky. 578, 123 S. W. 239; *Wheeler v. Commonwealth*, 120 Ky. 697, 27 Ky. Law Rep. 1090, 87 S. W. 1106; *Miller v. Commonwealth*, 89 Ky. 653, 10 Ky. Law Rep. 672, 10 S. W. 137; *Hart v. Commonwealth*, 85 Ky. 77, 7 Am. St. Rep. 576, 2 S. W. 673, 8 Ky. Law Rep. 714; *State v. Barksdale*, 122 La. 788, 791, 48 South. 264; *State v. Williams*, 40 La. Ann. 168, 3 South. 629; *State v. Fisher*, 33 La. Ann. 1344; *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380; *Sinclair v. State*, 87 Miss. 330, 112 Am. St. Rep. 446, 2 L. R. A., N. S., 553, 39 South. 522; *Prine v. State*, 73 Miss. 838, 19 South. 711; *Bell v. State*, 66 Miss. 192, 5 South. 389; *Johnson v. State*, 54 Miss. 430; *State v. Birks*, 199 Mo. 263, 97 S. W. 578; *State v. Downs*, 91 Mo. 19, 3 S. W. 219; *State v. Alexander*, 66 Mo. 148; *State v. Elkins*, 63 Mo. 159; *State v. Felker*, 27 Mont. 451, 71 Pac. 668; *State v. Shadwell*, 26 Mont. 52, 66 Pac. 508; *State v. Jackman*, 29 Nev. 403, 91 Pac. 143; *Territory v. Hall*, 10 N. M. 545, 62 Pac. 1083; *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *State v. Byrd*,

accused himself may give evidence of the threats.⁴⁴ When the *good faith* of a party is in issue, the proof is not confined to circumstances from which such good faith may be inferred, but the *witness may state directly* that he acted in good faith.⁴⁵

§ 147 (146). **Facts apparently collateral to repel the inference of accident.**—We have already had occasion to refer incidentally to this part of our subject.⁴⁶ There is a class of cases, perhaps hardly distinct in principle from these already referred to, in which it becomes necessary to show that the act under inquiry was *not accidental*; and in which it may be relevant to show that such act formed a part of a *series of similar occurrences* in each of which the person doing the act was concerned.⁴⁷ Thus in actions of *homicide* by poison or other secret mode it has been held admissible, in order to repel the inference of accident, to prove other mysterious or unexplained deaths in the same household.⁴⁸ Where the prisoner was charged with mur-

121 N. C. 684, 28 S. E. 353; *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455; *Dickson v. State*, 39 Ohio St. 73; *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965; *State v. Doris*, 51 Or. 136, 16 L. R. A., N. S., 660, 94 Pac. 44; *State v. Tarter*, 26 Or. 38, 37 Pac. 53; *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199; *State v. Faile*, 43 S. C. 52, 29 S. E. 798; *Little v. State*, 65 Tenn. 491; *Pate v. State*, 54 Tex. Cr. 491, 113 S. W. 757; *Stewart v. State*, 36 Tex. Cr. 130, 35 S. W. 985; *Levy v. State*, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *White v. Territory*, 3 Wash. Ter. 397, 19 Pac. 37; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *State v. Abbott*, 8 W. Va. 741; *Allison v. United States*, 160 U. S. 203, 40 L. Ed. 395, 16 Sup. Ct. Rep. 252; *Wiggins v. People*, 93 U. S. 465, 23 L. Ed. 941.

⁴⁴ *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

⁴⁵ *Snow v. Paine*, 114 Mass. 520. See § 158, *post*, and cases.

⁴⁶ § 143 *et seq.*, *ante*.

⁴⁷ *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69, and note; *People v. Shulman*, 80 N. Y. 373, note; *Commonwealth v. Bradford*, 126 Mass. 42; *Goersen v. Commonwealth*, 99 Pa. 388; *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *Steph. Ev.*, art. 12.

⁴⁸ *Hawes v. State*, 88 Ala. 37, 7 South. 302; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325; *Turner v. State*, 102 Ind. 425, 1 N. E. 869; *People v. Hoffman*, 142 Mich. 531, 105 N. W. 838; *People v. Giddings*, 159 Mich. 523, 18 Ann. Cas. 844, 124 N. W. 546; *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; *State v. Plunkett*, 64 Me. 534; *State v. Neagle*, 65 Me. 468; *Common-*

der by strychnine poisoning, it was held that evidence that a member of the family where prisoner lived had also died from the effects of the same poison should properly be considered by the jury on the question of whether the second death was accidental. Pinney, J., in that case⁴⁹ gave an elaborate *résumé* of the leading English authorities, and among them Pollock, C. B.,⁵⁰ in a case of arsenic poisoning, who held that such evidence was receivable for the purpose of proving—*first*, that the death, whether felonious or not, was occasioned by arsenic; *second*, that the domestic history of the family during the period that other deaths occurred was receivable to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not; and Baron Alderson and Mr. Justice Talfourd concurred in this opinion. Where the prisoner was charged with the murder of one of his daughters, the theory of the prosecution was that the defendant conceived that the lives of his wife and of their children, who had all died under suspicious circumstances, stood between him and the consummation of a second marriage, and hence that the motive which prompted the murder of each of them was the same. There was evidence tending strongly to support this theory, and to show that the death of each one of the victims was but a part of a system in which the lives of all were involved, and in the working out

wealth v. Bradford, 126 Mass. 42; Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452; Knights v. State, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; State v. Sparks, 79 Neb. 511, 114 N. W. 598, 79 Neb. 504, 113 N. W. 154; People v. Wood, 3 Park. Cr. (N. Y.) 681; Shriedley v. State, 23 Ohio St. 130; State v. Germain, 54 Or. 395, 103 Pac. 521; Commonwealth v. Birriolo, 197 Pa. 371, 47 Atl. 355; Goersen v. Commonwealth, 99 Pa. 388; Commonwealth v. Bell, 166 Pa. 405, 31 Atl. 123; Commonwealth v. Valverdi, 218 Pa. 7, 66 Atl. 877; State v. McDonald, 14 R. I. 270;

Penrice v. State (Tex. Cr.), 105 S. W. 797; Hall v. State, 31 Tex. Cr. 565, 21 S. W. 368; Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627; Zoldoske v. State, 82 Wis. 580, 52 N. W. 778; Reg. v. Heesom, 14 Cox. C. C. 40; Reg. v. Roden, 12 Cox C. C. 630; Reg. v. Cotton, 12 Cox C. C. 400; Reg. v. Richardson, 2 Fost. & F. 343; Reg. v. Geering, 18 L. J. M. C. 215; Rex v. Mogg, 4 Car. & P. 420; Rex v. Voke, 1 Russ. & Ry. 531; King v. United States, 112 Fed. 988, 50 C. C. A. 647.

⁴⁹ Zoldoske v. State, *supra*.

⁵⁰ Reg. v. Geering, *supra*.

of which, to the accomplishment of defendant's ulterior purpose, the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife, or of one of his daughters, was relevant to the issues involved on his trial for the murder of another daughter and was properly admitted.⁵¹ On an indictment for malicious shooting, it has been held relevant to show that the accused had twice shot at the prosecutor on the same day.⁵² On an indictment for the murder of one Ira Mullins, a witness testified that about three weeks before the killing of Mullins there had been a previous attempt to kill him. On writ of error the court of appeals said that the fact that Ira Mullins' house, and bed in which he was lying, were fired into about three weeks before the killing was important, material, and proper evidence in view of the testimony of sundry witnesses that the prisoner, over and over again, mentioned it in a way showing that he had done it himself, or had procured it to be done. He said to a witness Noah Hubbard: "Ira Mullins offered one hundred dollars to have me killed on Saturday, and his bed was shot into on Sunday; but I was over in Kentucky." He said to another witness Dock Swindall: "Some time after he had offered the reward to have me killed somebody shot into his bed, but it wasn't me," and laughed. His declarations to three other witnesses about the shooting into the bed of Ira Mullins, to the same effect, made the evidence of the fact of shooting into the bed of Ira Mullins admissible.⁵³ On the charge of *burning* a house for the insurance money, it is relevant to show that the accused had previously lived in several other houses in which fires had occurred for which he had received the insurance money.⁵⁴ Statements by the accused foretelling a series of fires, of which the one charged to him formed a part, are relevant, and it has also been

⁵¹ Hawes v. State, 88 Ala. 37, 7 South. 302.

⁵² Rex v. Voke, Russ. & R. C. C. 531.

⁵³ Taylor v. Commonwealth, 90 Va. 109, 17 S. E. 812. See, also, Shaw v. State, 60 Ga. 246.

⁵⁴ Rex v. Gray, 4 Fost. & F. 1102.

held that the fact of the accused having been seen previously near a hay-rick with a gun in his hand was relevant on a charge of firing the same rick by discharging his gun close to it.⁵⁵ In a recent case the property destroyed by fire was a hotel building occupied by the accused as tenant. She owned the hotel furniture, which was mortgaged for twelve hundred dollars, and two of the questions to which objection was made related to the amount of insurance on the hotel furniture held by her, and her application for additional insurance shortly before the fire in question. This evidence was clearly competent as tending to show a motive for incendiarism on accused's part. The state was also permitted to prove that, during the tenancy of the accused of four or five months, four different fires had occurred in the hotel with attendant circumstances indicating an incendiary origin. The evidence tended to implicate her and was proper.⁵⁶ On the trial of an indictment for keeping a *bawdy-house*, it is relevant to show repeated arrests and convictions of girls at the house of the accused on the charge of being prostitutes, and generally of the bad character and conduct of the frequenters.⁵⁷

⁵⁵ *Martin v. State*, 28 Ala. 71; *Mitchell v. State*, 140 Ala. 118, 103 Am. St. Rep. 17, 37 South. 76; *McSwean v. State*, 113 Ala. 661, 21 South. 211; *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919; *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091; *People v. Shainwold*, 51 Cal. 468; *Chapman v. State*, 112 Ga. 56, 37 S. E. 102; *Hinkle v. State*, 174 Ind. 276, 91 N. E. 1090; *Commonwealth v. McCarthy*, 119 Mass. 354; *Commonwealth v. Bradford*, 126 Mass. 42; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786, 71 S. W. 680; *Knights v. State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000; *People v. Bush*, 4 Hill (N. Y.), 133; *McDermott v. People*, 5 Park. Cr. (N. Y.) 102; *Wright v. People*, 1 N. Y. Cr. 462; *Woodford*

v. People, 5 Thomp. & C. (N. Y.) 539, 62 N. Y. 117, 20 Am. Rep. 464; *Carn-cross v. People*, 1 N. Y. Cr. 518; *State v. Thompson*, 97 N. C. 496, 1 S. E. 921; *State v. Allen*, 149 N. C. 458, 62 S. E. 597; *State v. McCall*, 131 N. C. 798, 42 S. E. 894; *State v. Smith*, 55 Or. 408, 106 Pac. 797; *Kramer v. Commonwealth*, 87 Pa. 299; *State v. Hallock*, 70 Vt. 159, 40 Atl. 51; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Reg. v. Gray*, 4 Fost. & F. 1102; *Reg. v. Bailey*, 2 Cox C. C. 311.

⁵⁶ *Hinkle v. State*, *supra*.

⁵⁷ *Toney v. State*, 60 Ala. 97; *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Cadwell v. State*, 17 Conn. 467; *King v. State*, 17 Fla. 183; *Mahalovitch v. State*, 54 Ga. 217; *Coleman v. State*, 5 Ga. App. 766, 64 S. E. 828; *McConnell v. State*, 2

§ 148 (147). Character — When relevant. — It seems hardly credible that in this twentieth century cases have still to be decided and text-books written about the reception of evidence of character in ordinary suits. We use the words “character” and “reputation” interchangeably, though they are not, strictly speaking, synonymous. Yet only so recently as 1910 there was an illustration of the necessity for appellate watchfulness. An action to recover land was brought by two brothers named Quinalty against Temple and others. The plaintiffs were the sons and heirs of John Quinalty, who died in 1855. The defendants claimed title under a deed from one Forbes to one Barrett dated 1837, containing a recital that it was of “land which he [Forbes] purchased from John Quinalty by deed bearing date October 7, 1836, now delivered to the present pur-

Ga. App. 445, 58 S. E. 546; Parker v. People, 94 Ill. App. 648; Winslow v. State, 5 Ind. App. 306, 32 N. E. 98; Garrison v. State, 14 Ind. 287; Whitlock v. State, 4 Ind. App. 432, 30 N. E. 934; State v. Burns, 145 Iowa, 588, 124 N. W. 600; State v. Porter, 130 Iowa, 690, 107 N. W. 923; State v. Toombs, 79 Iowa, 741, 45 N. W. 300; Walker v. Commonwealth, 117 Ky. 727, 79 S. W. 191; State v. West, 46 La. Ann. 1009, 15 South. 418; State v. Boardman, 64 Me. 523; Beard v. State, 71 Md. 275, 17 Am. St. Rep. 536, 4 L. R. A. 675, 17 Atl. 1044; Commonwealth v. Dam, 107 Mass. 210; People v. Russell, 110 Mich. 46, 67 N. W. 1099; State v. Smith, 29 Minn. 193, 12 N. W. 524; State v. Keithley, 142 Mo. App. 417, 127 S. W. 406; State v. Price, 115 Mo. App. 656, 92 S. W. 174; Clementine v. State, 14 Mo. 112; State v. Hendricks, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93; Drake v. State, 14 Neb. 535, 17 N. W. 117; State v. McGregor, 41 N. H. 407; State v. Baans, 77 N. J. L. 123, 71 Atl. 111; State v. Kelly, 76 N. J. L.

576, 70 Atl. 342; Roop v. State, 58 N. J. L. 479, 34 Atl. 749; People v. Jones, 129 App. Div. 772, 113 N. Y. Supp. 1097; People v. Hulett, 61 Hun, 620, 15 N. Y. Supp. 630; Harwood v. People, 26 N. Y. 190, 84 Am. Dec. 175; Commonwealth v. Bunnell, 20 Pa. Super. 51; Commonwealth v. Sarves, 17 Pa. Super. 407; Commonwealth v. Murr, 7 Pa. Super. 389; State v. Cambron, 20 S. D. 282, 105 N. W. 241; Hickman v. State, 59 Tex. Cr. 88, 126 S. W. 1149; Stone v. State, 47 Tex. Cr. 575, 85 S. W. 808; Wimberly v. State, 53 Tex. Cr. 11, 108 S. W. 384; Sullivan v. State, 75 Wis. 650, 44 N. W. 647; United States v. Stevens, 4 Cranch C. C. 341, 27 Fed. Cas. No. 16,391; United States v. McDowell, 4 Cranch C. C. 423, 26 Fed. Cas. No. 15,671; United States v. Jourdiné, 4 Cranch C. C. 338, 26 Fed. Cas. No. 15,499; Botts v. United States, 155 Fed. 50, 12 Ann. Cas. 271, 83 C. C. A. 646; United States v. Burch, 1 Cranch, 36, Fed. Cas. No. 14,683; United States v. McCormick, 4 Cranch, 104, Fed. Cas. No. 15,661.

chaser who hereby acknowledges the receipt thereof." The question submitted to the jury, therefore, was whether the recital in the deed to Barrett that Quinalty had conveyed the land to Forbes was true or untrue. Unless the jury was satisfied of its truth, they were instructed to find for the plaintiffs. The defendants, to sustain and support the truth of the recital, were permitted to prove, against the objection and exception of the plaintiffs, that John Forbes who conveyed to Barrett, was a man of good reputation "for honesty and fairness in his business transactions," and that the witness never heard "his integrity in land transactions questioned." Evidence as to the general character of John Forbes was offered and received, of course, on the theory that a man of good character for fairness in business transactions would not probably represent by a recital in a paper signed by him that the land had been conveyed to him, when it had not been. Circuit Judge Shelby said: "If, as a witness on the stand, he had testified to the recited facts, the same argument would apply—that his statement would be supported and strengthened by proof of his general good character for truth and veracity; yet it is well settled that evidence of the good character of a witness, whose character has not been attacked, is not admissible. Until an attack is made on it, the character of a witness is not in question. The same is true as to the character of a defendant in a civil suit, where the nature of the action itself does not involve his general character; therefore evidence of his character cannot be received to contradict an imputation of dishonesty or fraud. Even if the position of Forbes was analogous to that of a witness, his evidence could not be bolstered and supported, no attack having been made on him, by proof of his general good character."⁵⁸ Since, then, it is still necessary to deal with what should be a legal axiom,⁵⁹ we

⁵⁸ Quinalty v. Temple, 176 Fed. 67, 27 L. R. A., N. S., 1114, 99 C. C. A. 375.

⁵⁹ Most of the code states have

made substantive law of it. The California Code of Civil Procedure has it in these words: "§ 2053. Evidence of the good character of a party is not

must inquire, under what circumstances is the character of a litigant relevant as evidence? If it is charged that a party has been guilty of an unlawful or of an immoral act, the fact that he is known to have many times committed similar acts would no doubt be a circumstance which would in the ordinary affairs of life weigh heavily against him. In popular estimation few facts are more potent in determining the merits of any claim than the character of the respective litigants; and yet it is the general rule of law that in civil actions the character of the parties is irrelevant. However just the inferences which might in many cases be drawn as to the merits of the controversy from the character of the parties, such inferences are too vague and unreliable for that degree of certainty which should prevail in legal tribunals.⁶⁰ Character is not relevant in

admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character."

⁶⁰ *Davis v. Sanders*, 133 Ala. 275, 32 South. 499; *Lord v. Mobile*, 113 Ala. 360, 21 South. 366; *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228; *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909; *Humphrey v. Humphrey*, 7 Conn. 116; *Atlanta etc. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763; *Kozlowski v. Chicago*, 113 Ill. App. 513; *Cummins v. Crawford*, 88 Ill. 312, 30 Am. Rep. 558; *Mark v. Merz*, 53 Ill. App. 458; *Croze v. Rutledge*, 81 Ill. 266; *Ellwood v. Walter*, 103 Ill. App. 219; *Walker v. State*, 6 Blackf. (Ind.) 1; *Haun v. Wilson*, 28 Ind. 296; *Church v. Drummond*, 7 Ind. 17; *Barton v. Thompson*, 56 Iowa, 571, 41 Am. Rep. 119, 9 N. W. 899; *Porter v. Whitlock*, 142 Iowa, 66, 120 N. W. 649; *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113; *Chesapeake etc. Ry. Co. v. Riddle*, 24 Ky. Law Rep. 1687, 72 S. W. 22; *Omer v. Commonwealth*, 95 Ky. 353, 25 S. W. 594; *Revill v. Pettit*, 3 Met.

(Ky.) 314; *Sickra v. Small*, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9; *Dunham v. Rackliff*, 71 Me. 345; *Thayer v. Boyle*, 30 Me. 475; *Brooke v. Berry*, 2 Gill (Md.), 83; *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. 561, 82 N. E. 28; *Lamagdelaine v. Tremblay*, 162 Mass. 339, 39 N. E. 38; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 461; *McQuisten v. Detroit etc. R. Co.*, 150 Mich. 332, 113 N. W. 1118; *Adams v. Elseffer*, 132 Mich. 100, 92 N. W. 772; *Wolf v. Troxell*, 94 Mich. 573, 54 N. W. 383; *Fahey v. Crotty*, 63 Mich. 383, 6 Am. St. Rep. 305, 29 N. W. 876; *Leinkauf v. Brinker*, 62 Miss. 255, 52 Am. Rep. 183; *Black v. Epstein*, 221 Mo. 286, 120 S. W. 754; *Milan Bank v. Richmond*, 235 Mo. 532, 139 S. W. 352; *Stewart v. Watson*, 133 Mo. App. 44, 112 S. W. 762; *Boggs v. Lynch*, 22 Mo. 563; *Alkire Grocer Co. v. Taggart*, 78 Mo. App. 166; *Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722; *Dame v. Kenney*, 25 N. H. 318; *Matthews v. Huntley*, 9 N. H. 146; *Houghtaling v. Kilderhouse*, 1 N. Y.

civil action for *assault* and battery,⁶¹ nor in actions for *trespass*,⁶² *trover*,⁶³ *negligence*,⁶⁴ or *divorce*,⁶⁵ nor in an

530; *Jacobs v. Duke*, 1 E. D. Smith (N. Y.), 271; *Senecal v. Thousand Island Steamboat Co.*, 79 Hun, 574, 29 N. Y. Supp. 884; *Bowerman v. Bowerman*, 76 Hun, 46, 27 N. Y. Supp. 579; *Pratt v. Andrews*, 4 N. Y. 493; *Fowler v. Aetna F. Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Butler v. South Carolina etc. R. Co.*, 130 N. C. 15, 40 S. E. 770; *Jeffries v. Harris*, 3 Hawks (10 N. C.), 105; *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333; *Sayen v. Ryan*, 9 Ohio C. C. 631; *Baltimore etc. R. Co. v. Colvin*, 118 Pa. 230, 12 Atl. 337; *Anderson v. Long*, 10 Serg. & R. (Pa.) 55; *Zitzer v. Merkel*, 24 Pa. 408; *Battles v. Laudenslager*, 84 Pa. 446; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *McKenzie v. Allen*, 3 Strob. (S. C.) 546; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497; *McHay v. Peterson*, 52 Tex. Civ. App. 195, 113 S. W. 981; *Electric Co. v. Jones* (Tex. Civ. App.), 129 S. W. 863; *Hurst v. Benson* (Tex. Civ. App.), 71 S. W. 417; *Donaldson v. Dobbs*, 35 Tex. Civ. App. 439, 80 S. W. 1084; *Tipton v. Thompson*, 21 Tex. Civ. App. 143, 50 S. W. 641; *Jackson v. Martin* (Tex. Civ. App.), 41 S. W. 837; *Wright v. McKee*, 37 Vt. 161; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049; *Claiborne v. Chesapeake & O. R. Co.*, 46 W. Va. 363, 33 S. E. 262; *Quinalty v. Temple*, 176 Fed. 67, 27 L. R. A., N. S., 1114, 99 C. C. A. 375; *Morgan v. Barnhill*, 118 Fed. 24, 55 C. C. A. 1; *Ketland v. Bissett*, 1 Wash. 144, 14 Fed. Cas. No. 7742; *Thompson v. Bowie*, 4 Wall. (U. S.) 463, 18 L. Ed. 423; *Ketland v. Bissett*, 1 Wash. C. C. 144, 14 Fed. Cas. No. 7742. Among the late cases are: *Dennis v.*

Columbia etc. P. Co. (S. C.), 76 S. E. 711; *Cudlipp v. Cummings Exp. Co. (Tex. Civ. App.)*, 149 S. W. 444; *Hatch v. Bayless*, 164 Mo. App. 216, 146 S. W. 839; *Word v. Houston Oil Co. (Tex. Civ. App.)*, 144 S. W. 334; *Volker v. State (Ind.)*, 97 N. E. 422. See, also, *Shoffner v. Fink*, 163 Mo. App. 113, 145 S. W. 504 (in claim against decedent's estate); *Taylor v. Heft*, 150 App. Div. 509, 135 N. Y. Supp. 450 (in claim for board, evidence of immoral relation between parties irrelevant); *Pierce v. Cole (Me.)*, 85 Atl. 567 (action of deceit); *McIntosh v. McNair (Or.)*, 126 Pac. 9 (evidence in action for price of property that seller was perfunctory in payment of his debts irrelevant); *Strother v. McFarland*, 166 Mo. App. 364, 148 S. W. 988, in action for conversion of property that plaintiff and his wife were "tax dodgers." See extended note to *State v. Hull*, 20 L. R. A. 609-619, on the general subject of proof of character, discussed in this and in the succeeding section.

⁶¹ *Thompson v. Church*, 1 Root (Conn.), 312; *Elliott v. Russell*, 92 Ind. 526; *Givens v. Bradley*, 3 Bibb (Ky.), 192, 6 Am. Dec. 646; *Fahey v. Crotty*, 63 Mich. 388, 6 Am. St. Rep. 305, 29 N. W. 876; *Willis v. Forrest*, 2 Duer (N. Y.), 310; *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *Barton v. Bruley*, 119 Wis. 326, 96 N. W. 815.

⁶² *Cummins v. Crawford*, 88 Ill. 312, 30 Am. Rep. 558.

⁶³ *Wright v. McKee*, 37 Vt. 161.

⁶⁴ *Commonwealth v. Worcester*, 3 Pick. 462; *Boggs v. Lynch*, 22 Mo. 563.

⁶⁵ *Ward v. Herndon*, 5 Port. (Ala.) 382; *Humphrey v. Humphrey*, 7 Conn. 116; *Berdell v. Berdell*, 80 Ill.

action by *physician for fees*,⁶⁶ nor is evidence of *plaintiff's bad repute* relevant in a civil action for assault and battery.⁶⁷ Evidence of character in such cases has but a remote bearing as proof to show that the act in question has or has not been committed. It is uncertain in its nature, because true character is ascertained with difficulty, and those who are called to testify are reluctant to disparage the influential and often too willing to disparage one under a cloud.⁶⁸ The learned judge in the case above referred to said:⁶⁹ "At best, such evidence is a mere matter of opinion, and, in matters of opinion, witnesses are apt to be influenced by prejudice or partisanship, of which they may be unconscious, or by the opinions of those who first approach them on the subject. The introduction of such evidence, in civil cases, to bolster the character of parties and witnesses who have not been impeached, would make trials intolerably tedious and greatly increase the expense and delay of litigation."⁷⁰ If in all cases of contract and

604; *Washburn v. Washburn*, 5 N. H. 195. In *O'Bryan v. O'Bryan*, 13 Mo. 16, 53 Am. Dec. 128, the court admitted evidence of general good character where the charge was adultery, holding that it was essentially a criminal charge.

⁶⁶ *Jeffries v. Harris*, 3 Hawks (N. C.), 105.

⁶⁷ *Drohn v. Brewer*, 77 Ill. 280; *Bruce v. Priest*, 5 Allen (Mass.), 100; *Corning v. Corning*, 6 N. Y. 97.

⁶⁸ Shakespeare's keen insight is expressed in

"Even so may Angelo

In all his dressings, characters, titles, forms

Be an arch villain."

—*Measure for Measure. Act. V, Sc. 1.*

"Reputation is an idle and most false imposition; oft got without merit, and lost without deserving."

—*Othello, Act II, Sc. 3.*

⁶⁹ Circuit Judge Shelby in *Quinalty v. Temple*, *supra*.

⁷⁰ To carry the matter still further, evidence was permitted to show the character of the plaintiffs' father. The elder Quinalty said the witness "danced, drank whisky and played the fiddle." Surely those attacking this character were "breaking jests as braggarts do their blades." It was seriously put that "evidence of the traits, characteristics, propensities, habits and general manners of life of Quinalty was very material and relevant upon this issue," that is to say, that because Quinalty was a rover and danced and drank whisky and—*anathema maran atha*—played the fiddle, it was seriously put he was not likely to retain ownership of land, and therefore the recital by a stranger was to be accepted as true by a jury, who were asked to deny the plaintiffs their rights!

tort such evidence were to be received, the result would be more dependent on the popularity of the party than on the merits. The testimony would consist largely of matters of opinion and be greatly affected by bias and partisanship and would cause intolerable delay and expense. In a civil action for assault the proof was offered of defendant's character as a quarrelsome man. The court said: "The general character is not in issue. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause."⁷¹ For still more obvious reasons the character of the parties is generally irrelevant in actions on contracts.⁷² In actions based on *negligence* it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent; in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent.⁷³

§ 148a (147). **Same—Criminal cases.**—In criminal cases it is obvious from the discussion on the presumption of innocence that it is not open to the prosecution to touch upon the character of the accused *in the original case* as presented to the court;⁷⁴ or, as it was well said in a Cali-

⁷¹ *Thompson v. Church*, 1 Root (Conn.), 312. See notes to *O'Bryan v. O'Bryan*, 53 Am. Dec. 133; *Barton v. Thompson*, 41 Am. Rep. 120.

⁷² *Battles v. Landenslager*, 84 Pa. 446.

⁷³ *Tenney v. Tuttle*, 1 Allen (Mass.), 185; *Hays v. Millar*, 77 Pa. 238, 18 Am. Rep. 445; *Hill v. Snyder*, 44 Mich. 318; *Dunham v. Rackliff*, 71 Me. 345.

⁷⁴ *Harrison v. State*, 37 Ala. 154; *Ware v. State*, 91 Ark. 555, 121 S. W. 927; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111; *People v. Fair*, 43 Cal. 137; *State v. Nussenholtz*, 76 Conn. 92, 55 Atl. 589; *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312; *Clinton v. State*, 53 Fla. 98,

12 Ann. Cas. 150, 43 South. 312; *Mann v. State*, 22 Fla. 600; *McLeod v. State*, 128 Ga. 17, 57 S. E. 83; *Pound v. State*, 43 Ga. 88; *Wilcox v. United States*, 7 Ind. Ter. 86, 103 S. W. 774; *State v. Thompson*, 127 Iowa, 440, 103 N. W. 377; *State v. Rainsbarger*, 71 Iowa, 746, 31 N. W. 865; *State v. Thurtell*, 29 Kan. 148; *Newman v. Commonwealth*, 28 Ky. Law Rep. 81, 88 S. W. 1089; *Young v. Commonwealth*, 6 Bush (Ky.), 312; *Commonwealth v. Hardy*, 2 Mass. 303; *State v. Beckner*, 194 Mo. 281, 3 L. R. A., N. S., 535, 91 S. W. 892; *State v. Nelson*, 98 Mo. 414, 11 S. W. 997; *Carter v. State*, 36 Neb. 481, 54 N. W. 853; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep.

fornia case,⁷⁵ it is not competent to the prosecution to initiate the inquiry, and that it is only after the prisoner has elected to put his character in issue, by calling witnesses and adducing evidence in its distinctive support, that the prosecution is permitted to follow and disprove the evidence so offered, if it can. "Nor is the prisoner to be held to have thus led the way, and opened up her character to the attack of the prosecution, merely because the case made or attempted in the defense is rendered more formidable when considered in connection with the good character—good in the sense of not being bad—which the law assumes the prisoner to possess in cases in which no evidence upon the subject of general character is offered. The presumption of a character of ordinary fairness, with which the law clothed her for the purposes of the case, was one to the benefit of which she was entitled, and which could not be put in peril unless, discarding the presumption thus afforded her, she had elected to put it distinctly in issue, and so constitute it a fact to be determined by the jury as other facts in issue were to be determined."⁷⁶ Of

69; *People v. Springer*, 137 App. Div. 304, 122 N. Y. Supp. 194; *Adams v. People*, 9 Hun (N. Y.), 89; *State v. Barrett*, 151 N. C. 665, 65 S. E. 894; *State v. Hare*, 74 N. C. 591; *Hamilton v. State*, 34 Ohio St. 82; *State v. Hull*, 18 R. I. 207, 20 L. R. A. 609, 26 Atl. 191; *Bays v. State*, 50 Tex. Cr. 548, 99 S. W. 561; *Puryear v. State*, 50 Tex. Cr. 454, 98 S. W. 258; *Melton v. State*, 47 Tex. Cr. 451, 83 S. W. 822; *Moore v. State*, 46 Tex. Cr. 54, 79 S. W. 565; *Martin v. State*, 44 Tex. Cr. 279, 70 S. W. 973; *Dimry v. State*, 41 Tex. Cr. 272, 53 S. W. 853; *State v. Clark*, 64 W. Va. 625, 63 S. E. 402; *State v. Grove*, 61 W. Va. 697, 57 S. E. 296; *United States v. Carrigo*, 25 Fed. Cas. No. 14,735, 1 Cranch C. C. 49; *United States v. Jourdine*, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338; *United*

States v. Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122; *United States v. Warner*, 28 Fed. Cas. No. 16,642, 4 Cranch C. C. 342; *Reg. v. Rowton*, 10 Cox C. C. 25, 11 Jur., N. S., 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T., N. S., 745, 13 Wkly. Rep. 436; *Rex v. Long*, 11 Quebec K. B. 328.

⁷⁵ *People v. Fair*, 43 Cal. 137.

⁷⁶ Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecution may offer witnesses to disprove their testimony. But it is not competent for the prosecution to go into the inquiry until the defendant has voluntarily put his character in issue: *Commonwealth v. Hardy*, 2 Mass. 317. A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury to de-

course the rule does not apply where a particular trait of character in a third person is to be established, such as the chastity of a prosecutrix.⁷⁷ The inquiry in criminal cases is limited to the particular characteristic trait displayed in the alleged commission of the offense for which the accused is being tried. Phillips says:⁷⁸ "On a charge of stealing it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which is alone the subject of inquiry. It would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is, therefore, totally inapplicable to the point in question."⁷⁹ Once, however, the accused puts in evidence of character, it is open to the prosecution to rebut it.⁸⁰

termine like other controverted facts: *People v. Bodine*, 1 Denio (N. Y.), 314.

⁷⁷ *People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 438, 3 N. W. 927.

⁷⁸ Phillips on Ev. 490.

⁷⁹ *South etc. R. Co. v. Chappell*, 61 Ala. 527; *United States v. Chung Sing*, 4 Ariz. 217, 36 Pac. 205; *Kee v. State*, 28 Ark. 155; *People v. Fair*, 43 Cal. 137; *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *People v. Josephs*, 7 Cal. 129; *State v. Conlan*, 3 Penne. (Del.) 218, 5 Atl. 95; *Stamper v. Griffin*, 12 Ga. 450; *State v. Heacock*, 106 Iowa, 191, 76 N. W. 654; *State v. Kinley*, 43 Iowa, 294; *Carr v. State*, 135 Ind. 1, 41 Am. St. Rep. 408, 20 L. R. A. 863, 34 N. E. 533; *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247; *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460; *Walker v. State*, 102 Ind. 502, 1 N. E. 856; *Young v. Commonwealth*, 6 Bush (Ky.), 312; *Clement v. Kimball*, 98 Mass.

535; *Commonwealth v. Nagle*, 157 Mass. 554, 32 N. E. 861; *Westbrooks v. State*, 76 Miss. 710, 25 South. 491; *State v. Dalton*, 27 Mo. 13; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *State v. Snover*, 63 N. J. L. 382, 43 Atl. 1059; *People v. Benedict*, 66 Hun, 629, 21 N. Y. Supp. 58; *State v. Staton*, 114 N. C. 813, 19 S. E. 96; *Clements v. Rogers*, 95 N. C. 248; *Griffin v. State*, 14 Ohio St. 55; *Commonwealth v. Irwin*, 1 Clark (Pa.), 344; *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158; *Mullinax v. Pyron* (Tex. Civ. App.), 123 S. W. 1139; *Rankin v. Busby* (Tex. Civ. App. 1894), 25 S. W. 678; *Lockhart v. State*, 3 Tex. App. 567; *State v. Surry*, 23 Wash. 655, 63 Pac. 557; *Edgington v. United States*, 164 U. S. 361, 41 L. Ed. 467, 17 Sup. Ct. Rep. 72.

⁸⁰ *Carson v. State*, 128 Ala. 58, 29 South. 608; *Weaver v. State*, 83 Ark. 119, 102 S. W. 713; *People v. Fair*, 43 Cal. 137; *Posey v. United States*,

§ 149 (148). **Qualifications of the rule—Libel and slander.**—We have shown that the evidence of character is generally inadmissible with regard to the cause of action or defense as the case may be. But although in civil actions evidence of character is not admissible to sustain the cause of action or defeat a recovery, there is a class of actions in which, from the nature of the issue, evidence of character is relevant as to the *measure of damages*. Perhaps this is most frequently illustrated in actions for *slander or libel*. Lord Ellenborough long since tersely stated the doctrine which still prevails: “Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by the evidence.”⁸¹ In a leading American case⁸² Brewer, J., puts it a little better. After stating the effect of a libelous statement on a man, honest and of good repute, he proceeds: “Now if it so happens that my life has been dishonest and impure, and you charge me with that, and prove that that is the fact, then I am entitled to nothing, for you have simply made public the actual truth. So, on the other hand, if, whatever may have been my actual life, the community here believes that I am dishonest, that I am impure, then your statement to that effect makes very little impression upon my reputation; the people already believe it, already

26 App. D. C. 302; *Cook v. State*, 46 Fla. 20, 35 South. 665; *Brantley v. State*, 133 Ga. 264, 65 S. E. 426; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899; *Commonwealth v. Hardy*, 2 Mass. 303; *People v. Marks*, 90 Mich. 555, 51 N. W. 638; *State v. Boyd*, 178 Mo. 2, 76 S. W. 979; *Biester v. State*, 65 Neb. 276, 91 N. W. 416; *People v. White*, 14 Wend. (N. Y.) 111; *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154; *State v. Laxton*, 76 N. C. 216; *Holloway v. State*, 45 Tex. Cr. 303, 77 S. W. 14; *State v. Marfaudille*, 48 Wash. 117, 15 Ann. Cas. 584, 14

L. R. A., N. S., 346, 92 Pac. 939; *Reg. v. Hughes*, 1 Cox C. C. 44; *Reg. v. Rowton*, L. & C. 520, 34 L. J. M. C. 57; *Reg. v. Burt*, 5 Cox C. C. 284; *Ling v. Rouse* (1904), 1 K. B. (Eng.) 184.

⁸¹ ——— *v. Moor*, 1 Maule & S. 284, 105 Eng. Reprint, 106; *Georgia v. Bond*, 114 Mich. 196, 72 N. W. 232; *Sickra v. Small*, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9; *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576; *Howland v. Blake Co.*, 156 Mass. 543, 31 N. E. 656.

⁸² *Edwards v. Kansas City Times Co.*, 32 Fed. 813.

think that it is so, and so I have not suffered, my reputation has not been damaged by your statement. Now go a little further; suppose it be true that I am known in the community, and justly so, as a common drunkard, a bar-room loafer, one that every man despises as he meets, and one of you should circulate or publish a statement against me that I had told a lie, or that I had stolen money. That may not have been my reputation before. People may simply have looked upon me as a mere wreck, a dissipated and worthless man, and may not have looked upon me as one who was a liar or a thief. Of course, in a certain sense, by the publication or statement you have injured my reputation; you have gotten people to believe I am worse than they thought me before; but, on the other hand, if I had such a reputation, how naturally you would say: 'Well, it does not hurt much.' People thought of me about as badly before as they do after the statement; my character and reputation in the community is not worth much; you cannot hurt that which is already badly injured." And inasmuch as the action for libel or slander is brought for the injury to the reputation the less valuable that reputation is, the less proportionate damage is suffered.⁸³ So that with a view to mitigate the damages the defendant may show that the plaintiff, although injured by the libel or slander, was injured by reason of his previous character to an extent for which a small sum by way of damages will

⁸³ In the case last cited the learned judge thus applies his reasoning. He says: "Now, that thought comes right into this case. The defendant says that the plaintiff's character is bad; that her reputation in the community was not that of a pure, truthful, honest, upright woman; and though this specific charge may not be technically true, yet she was not hurt much, because it only added to a bad reputation that she had already. Now, in respect to her reputation, you have the testimony of these witnesses as

to what it was in that community; you have also the testimony of one witness in which he says that he saw this plaintiff and her brother having improper intercourse. If it be true that she did have that incestuous intercourse with her brother, then, although it may not be true that she was pregnant as a result of that intercourse, your common sense tells you her reputation was not badly injured; she has suffered very little by this additional charge."

compensate. But in such cases the evidence must be confined to the *general reputation* of the plaintiff, before the publication of the slander or libel, and such reputation cannot be shown by specific instances of his misconduct.⁸⁴

⁸⁴ Scott v. McKinnish, 15 Ala. 662; Fuller v. Dean, 31 Ala. 654; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576; Jones v. Duchow, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Brunson v. Lynde, 1 Root (Conn.), 354; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Dowie v. Priddle, 216 Ill. 553, 3 Ann. Cas. 526, 75 N. E. 243; Corning v. Dollmeyer, 123 Ill. App. 188; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Tracy v. Hackett, 19 Ind. App. 133, 65 Am. St. Rep. 398, 49 N. E. 185; Burke v. Miller, 6 Blackf. (Ind.) 155; Hanners v. McClelland, 74 Iowa, 318, 37 N. W. 389; Fletcher v. Burroughs, 10 Iowa, 557; Haag v. Cooley, 33 Kan. 387, 6 Pac. 585; Campbell v. Bannister, 79 Ky. 205; Eastland v. Caldwell, 2 Bibb (Ky.), 21, 4 Am. Dec. 668; Kendrick v. Kemp, 6 Mart., N. S. (La.), 500; Sickra v. Small, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9; Ridley v. Perry, 16 Me. 21; Howland v. Blake Mfg. Co., 156 Mass. 543, 568, 31 N. E. 656; Mahoney v. Belford, 132 Mass. 393; Parkhurst v. Ketchum, 6 Allen (Mass.), 406, 83 Am. Dec. 639; Georgia v. Bond, 114 Mich. 196, 72 N. W. 232; Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Davis v. Hamilton, 88 Minn. 64, 92 N. W. 512; Simmons v. Holster, 13 Minn. 249; Hess v. Gansz, 90 Mo. App. 439; Adams v. Hannon, 3 Mo. 222; Anthony v. Stephens, 1 Mo. 254, 13 Am. Dec. 497; Powers v. Presgroves, 38 Miss. 227; Bernstein v.

Singer, 1 App. Div. 63, 36 N. Y. Supp. 1093; Calkins v. Colburn, 10 N. Y. St. 778; Andrews v. Vanduzer, 11 Johns. (N. Y.) 38; Root v. King, 7 Cow. (N. Y.) 613; Duval v. Davey, 32 Ohio St. 604; Dewit v. Greenfield, 5 Ham. (Ohio) 225; Neeb v. Hope, 111 Pa. 145, 155, 2 Atl. 568; Frazier v. Pennsylvania Ry. Co., 38 Pa. 104, 80 Am. Dec. 467, 469; Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Pier v. Speer, 73 N. J. L. 633, 64 Atl. 161; Sayre v. Sayre, 25 N. J. L. 235; Sowers v. Sowers, 87 N. C. 303; Viek v. Whitfield, 2 Hayw. (N. C.) 222; Polwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. 6; Eifert v. Sawyer, 2 Nott & M. (S. C.) 511, 10 Am. Dec. 633; Freeman v. Price, 2 Bail. (S. C.) 115; Hackett v. Brown, 2 Heisk. (Tenn.) 264; Lambert v. Pharis, 3 Head (Tenn.), 622; Knapp v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991; Bridgman v. Hopkins, 34 Vt. 532; Adams v. Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455; McNutt v. Young, 8 Leigh (Va.), 542; Earley v. Winn, 129 Wis. 291, 109 N. W. 633; Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004; Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657; Cunningham v. Underwood, 116 Fed. 803, 53 C. C. A. 99; Sun Printing etc. Assn. v. Schenck, 98 Fed. 925, 40 C. C. A. 163; Edwards v. Kansas City Times Co., 32 Fed. 813; Turner v. Foxall, 24 Fed. Cas. No. 14,255. 2 Cranch C. C. 324; Whitney v. Jaunesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330; Wright v. Schroeder,

"Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties and vices that are altogether contrary to the character actually established; and sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character."⁸⁵ Thus where slanderous words charged a physician with a want of skill, it was held inadmissible to show by way of mitigation specific instances of malpractice.⁸⁶ In an action for slander imputing perjury, other instances of perjury cannot be submitted to the jury from which they are to make an estimate of the plaintiff's character.⁸⁷ In an action for slander proof that others spoke the same words, that the report was current, is not admissible in mitigation of damages,⁸⁸ nor that the people of the locality in which the plaintiff lived had spoken of him in opprobrious terms;⁸⁹ nor can a defendant use his own bad character to mitigate the damages by suggesting that, coming from a disreputable source, little harm was done.⁹⁰ It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad.⁹¹ It is also settled law that only such facts are available in mitigation

30 Fed. Cas. No. 18,091, 2 Curt. 548; *Leicester v. Walter*, 3 Camp. 214, note, 2 Camp. 251; *Scott v. Sampson*, L. R. 8 Q. B. Div. 491; *Dodd v. Norris*, 3 Camp. 519.

⁸⁵ *Frazier v. Pennsylvania Ry. Co.*, 38 Pa. 104, 80 Am. Dec. 467, 469.

⁸⁶ *Swift v. Dickerman*, 31 Conn. 285.

⁸⁷ *Luther v. Skeen*, 8 Jones (53 N. C.), 356.

⁸⁸ *Anthony v. Stephens*, 1 Mo. 254, 13 Am. Dec. 497, and note.

⁸⁹ *Kendrick v. Kemp*, 6 Mart., N. S. (La.), 500.

⁹⁰ *Hastings v. Stetson*, 130 Mass. 76.

⁹¹ *Sun Printing & Publishing Assn. v. Schenck*, 98 Fed. 925, 40 C. C. A. 163. The strictness with which this rule is applied is shown in the ancient case of *Smithies v. Harrison*, 1 Ld. Raym. 727, 91 Eng. Reprint, 1385, and in the modern cases of *Andrews v. Van Duzer*, 11 Johns. (N. Y.) 38, and *Parkhurst v. Ketchum*, 6 Allen (Mass.), 406, 83 Am. Dec. 639.

of damages as were known to the defendant at the time of the publication, and which might have influenced him in making the defamatory statements.⁹² A plea in mitigation, setting up competent defensive facts, if interposed in bad faith, may be considered by the jury in aggravation of damages.⁹³

§ 150 (149). Same — Nature of proof — Pleadings. — There seems to be an apparently inextricable confusion existing as to what evidence may be given by the defendant in libel or slander actions as to the character of the plaintiff. In one century-old case⁹⁴ the court was divided, but the opinion of Kent, C. J., furnishes several propositions which are good law to-day. He said: "As the general character of the plaintiff cannot be questioned by the plea, it would seem to result, necessarily, from the received principle, that it might be questioned in mitigation of damages. The character of the plaintiff must be considered as coming in, at least collaterally, upon the trial. It is always alleged as the inducement to the action, and the injury to it is the *gravamen* complained of. In assessing the damages, the jury must take into consideration the general character, the standing and estimation of the plaintiff in society; for it will not be pretended, that every plaintiff is entitled to an equal sum, for the worth of character. The jury have, and must inevitably have, a very large and liberal discretion in apportioning the damages to the rank, condition and character of the plaintiff; and they must have evidence touching that condition and character, so as to have some guide to their discretion. If the plaintiff's character comes collaterally in question, in an action of slander, all that the books say in these cases is, that you cannot go into evidence of particular facts. There is not, I presume, a case to be met with, in which it is ruled, that

⁹² Bush v. Prosser, 11 N. Y. 347;
Hatfield v. Lasher, 81 N. Y. 246.

⁹⁴ Foot v. Tracy, 1 Johns. (N. Y.)
46.

⁹³ Cruikshank v. Gordon, 118 N. Y.
178, 23 N. E. 457.

you cannot examine into general character. Nor is there any general principle of law violated by such examination. Every man is supposed capable of supporting his general character, though no man is presumed to be capable of repelling a specific charge, without previous notice; and this is the true and rational distinction applicable to the case before us."⁹⁵ As to the kind of repute admissible, however, there is undoubtedly a conflict, and a unique one. As to the proof of general reputation there seems to be no unanimity as to its admissibility, and when it comes to reputation as to the particular traits alluded to in the charge the decisions are divided, so that we have in some states the admission of both kinds of testimony and in others the admission of the particular trait alone.⁹⁶ In

⁹⁵ *Elsam v. Fawcett*, 2 Esp. Cas. 562, Bull. N. P. 296, 5. The case of *Dennis v. Pawling* (12 Vin. 159, pl. 16), supports this view. That, says Kent, C. J., in *Foot v. Tracy*, *supra*, was an action of slander, and Baron Price would not allow any *particular credit* to be given of the plaintiff, in evidence on the trial; but said that if the defendant had a mind to examine to this, the question must be asked *in general*. So in cases of *crim. con.*, the defendant has been permitted to question the general character and conduct of the plaintiff. It appears to me, therefore, that the admission of such testimony violates no rule of law; but is rather required by the general principle which admits in evidence matters relevant to the cause, and which could not be pleaded, and allows the general character of the party to be examined, when it comes in collaterally; such evidence is essential to guide the discretion of the jury, and its legality receives strong countenance from decisions bearing on the question. It is worthy of notice that Kent, C. J., before whom the case of *Foot v. Tracy*, *supra*, had been tried, on the trial rejected the

evidence; but on the motion for new trial, he held that he had erred, and that a new trial should be granted on that ground. Mr. Justice Spencer, who heard the argument, gave no opinion, having been concerned as counsel. But in the case of *Springstein v. Field* (Anthon's N. P. 185), he declared that he had fully considered the question, and had no doubt of the admissibility of the evidence. Although the case of *Foot v. Tracy* was not decided, it may be safely said that few authorities upon either side of the Atlantic are entitled to more respectful consideration than one sustained by the deliberate concurrence of Kent and Thompson and Spencer. Since the case of *Foot v. Tracy*, the question has been repeatedly under consideration in the state of New York, and it has been uniformly held that the evidence is admissible: *Sayre v. Sayre*, 25 N. J. L. 235.

⁹⁶ It is almost impossible to classify the decisions by states as to the kind of repute admissible. Many of the states admit evidence of the particular trait alone, many admit both, so that reference to the decisions of the particular state is imperative.

consequence of this, the different statutory provisions of the various states must always be looked to. Under the former system of pleading, proof of the reputation of the plaintiff before and at the time of publication could be given in mitigation under the general issue;⁹⁷ and it has been held under the reformed procedure that while in general mitigating circumstances must be *specially pleaded*, the bad reputation of the plaintiff may be proved under the general denial. This is on the theory that a party must always be prepared to sustain his general reputation when it is in issue.⁹⁸ So it is presumed that he will always be able to defend his character in reference to that matter wherein he alleges it to have been wrongfully assailed.⁹⁹

§ 150a (149). Same—Limitation of attack to plaintiff's general reputation.—For the easier consideration of an admittedly complex question we propose to deal with it under the following heads: (a) Where the defendant is limited in his attack to the plaintiff's general reputation. (b) Where he may attack the plaintiff's general reputation and also give evidence in regard to the feature of the charge, the particular trait referred to in the defamatory matter. (c) Where he is limited to the particular trait. (d) The admissibility of rumors, both special and general, of the plaintiff's guilt of the matter charged. In Illinois, Ohio, Pennsylvania, New Jersey and Wisconsin it has been held that the evidence of character is limited to the general reputation. Green, C. J., in a New Jersey case, after an elaborate review of the English cases, said: "Where the evidence is introduced for the purpose of mitigating damages, on the ground that plaintiff's reputation has sustained but little injury, the plaintiff's general character, alone, should form the subject of examination. The question is not what may have been his character in any

⁹⁷ *Stone v. Varney*, 7 Met. (Mass.) 86, 39 Am. Dec. 762; *Hamer v. McFarlin*, 4 Denio (N. Y.), 509.

B—— v. I——, 22 Wis. 372, 94 Am. Dec. 604, and note.

⁹⁹ *Clark v. Brown*, 116 Mass. 504.

⁹⁸ *Wilson v. Noonan*, 35 Wis. 321;

given particular, but what was the estimation in which he was held among his neighbors and acquaintances. An examination of the cases already cited will show that this is the shape in which the evidence is usually admitted." And Barnes, J., in Wisconsin: "The defendants could not mitigate damages by showing specific acts of wrongdoing on the part of the plaintiff. Such evidence should be confined to the general bad character of the plaintiff."¹⁰⁰

§ 150b (149). Same—Attack on general reputation and particular trait.—The decisions in favor of the admissibility both of evidence of general reputation and also in regard to the feature of the charge are more numerous; and the evidence may tend either to establish that the plaintiff's character is generally bad, or that he has a bad reputation with reference to the kind of vice imputed in the alleged slander.¹ The defendant may show that the plaintiff's reputation in regard to the particular crime or fault charged, prior to the time the alleged slanderous words were uttered, was bad.² In slander the allegation of the plaintiff's character is merely matter of inducement, and not traversable; the gist of the action is the injury done to it. In assessing damages the jury must take into estimation the plaintiff's general character and his standing in society. The defendant has a right to go into evidence as to the plaintiff's general moral character, and is not to be confined to evidence of the particular species of immorality charged in the words laid.³ So it has been held that the defendant may introduce evidence in mitigation of damages that plaintiff's general reputation as a man of moral worth is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defama-

¹⁰⁰ Storey v. Early, 86 Ill. 461; Sayre v. Sayre, 25 N. J. L. 235; De-witt v. Greenfield, 5 Ohio, 225; Stein-man v. McWilliams, 6 Pa. 170; Pfister v. Milwaukee Press Co., 139 Wis. 627, 121 N. W. 938.

¹ Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244.

² B—— v. I——, 22 Wis. 372, 94 Am. Dec. 604.

³ Eastland v. Caldwell, 2 Bibb (Ky.), 21, 4 Am. Dec. 668.

tion in question.⁴ Numerous other cases on these lines are appended.⁵

§ 150c (149). Same—Limitation of attack to particular trait.—There are yet other decisions which limit the evidence of character to the particular phase of it attacked in the defamatory publication. They are, however, comparatively few in number, and an examination of them will show that in some instances the opinion is an *obiter dictum* arising from the rejection of evidence of specific offenses, and in others because the evidence was offered under the plea of justification.⁶

⁴ Sickra v. Small, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9.

⁵ Wright v. Schroeder, 2 Curt. 548, 30 Fed. Cas. No. 18,091; Fletcher v. Burroughs, 10 Iowa, 557; Hallowell v. Guntle, 82 Ind. 554; Sickra v. Small, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Leonard v. Allen, 11 Cush. (Mass.) 241; Clark v. Brown, 116 Mass. 504; Peterson v. Morgan, 116 Mass. 350; Bodwell v. Swan, 3 Pick. (Mass.) 377; Randall v. Evening News Assn., 97 Mich. 136, 56 N. W. 361; Clark v. Brown, 116 Mass. 504; Finley v. Widner, 112 Mich. 230, 70 N. W. 433; Stone v. Varney, 7 Met. (Mass.) 86, 39 Am. Dec. 762; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Paddock v. Salisbury, 2 Cow. (N. Y.) 811; Duvall v. Davey, 32 Ohio St. 604; Conroe v. Conroe, 47 Pa. 198; Steinman v. McWilliams, 6 Barr (Pa.), 170; Drown v. Allen, 91 Pa. 393; Long v. Brougher, 5 Watts (Pa.), 439; Moyer v. Moyer, 49 Pa. 210; Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Knapp v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991; Bowen v.

Hall, 20 Vt. 232; Bridgman v. Hopkins, 34 Vt. 532; McNutt v. Young, 8 Leigh (Va.), 542; Dillard v. Collins, 25 Gratt. (Va.) 343; Wilson v. Noonan, 35 Wis. 321; Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657; Turner v. Foxall, 2 Cranch C. C. 324, 24 Fed. Cas. No. 14,255.

⁶ For instance, in Dillard v. Collins, 25 Gratt. (Va.) 343, the syllabus says: "In an action for slander, the defendant cannot inquire into the social intercourse of the plaintiff with his neighbors. And where the slander charged is for horse-stealing, the defendant cannot introduce evidence of rumors as to the plaintiff or his sons having stolen a hog." Whereas the opinion says: "The questions ruled out by the court below, which form the ground of these exceptions, were inquiries as to common rumors connecting the plaintiff with hog-stealing, and as to the conviction of the plaintiffs and his sons with stealing a cow from the witness. Both of these questions were properly rejected by the court. Under the pleading in the cause these were not proper subjects of inquiry. The charge was that the plaintiff was a horse-thief. It would have been no answer, under the plea of justification, to show that the plain-

§ 150d (149). **Same—Rumors, special and general.**—A fourth class of decisions deals with the admissibility of rumors. There is an undoubted conflict of opinion as to whether, in mitigation of damages, the defendant in such actions may prove other reports or *rumors* of a nature to raise a belief in his mind that the statements were true. On the one hand, it is urged that the rumors themselves may have originated in slander, and that character could not be protected if the defendant could defend himself, or reduce the damages, on the ground that he only gave more publicity and added the weight of his character to a calumny originated by others. It is also urged that the admission of such evidence renders it easy, by collusion in procuring such rumors, to deprive the plaintiff of any possible mode of redress. According to this view such evidence is held irrelevant. Evidence as to the general character of the plaintiff he may at all times encounter, if untrue; and if his character be generally bad, independent of the

tiff had stolen a hog or a cow, much less would it be competent to prove common rumors in the neighborhood that he had been guilty of either of these crimes." And earlier Virginia cases lay down the rule correctly, that evidence of general bad character is always admissible in mitigation of damages: *McNutt v. Young*, 8 Leigh (Va.), 542; *Lincoln v. Chrisman*, 10 Leigh (Va.), 338, and *Adams v. Lawson*, 17 Gratt. (Va.) 250, 94 Am. Dec. 455. In *Lambert v. Pharis*, 3 Head (Tenn.), 622, the syllabus gives it that: "In actions of slander, the plaintiff's general character upon the trait involved in the charge is put in issue and may be proven; but his general character upon traits not involved in the charge, or special charges, or other crimes, or suspicions and rumors, are not admissible." But the action was for imputing perjury while the question under consideration was, "Was it not generally reported and believed in

the neighborhood of plaintiff that he burned Pharis' crib?" In *Wilson v. Noonan*, 27 Wis. 598, the syllabus says: "Lyon, J., is of the opinion that defendant in such an action should not be allowed to show plaintiff's bad reputation in respect to *any other* vice or fault than that charged in the libel. But it was not necessary to decide that question here." But on page 614 we find the learned judge saying: "The question as to whether it is competent in this action for the defendant to give evidence of the general reputation of the plaintiff without such restriction, is not before us on this appeal, except only as it may be incidentally involved in the argument and decision of questions which are presented directly for adjudication. The question here is, not whether evidence of the plaintiff's reputation *shall* be, but whether it *may* be, thus restricted."

slander of which he complains, the jury may consider it. For the worth of a man's general reputation among his fellow-citizens may entitle him to large damages for an attempt to injure it; which he ought not to obtain if his character is of little or no estimation in society. Parsons, C. J., in an old Massachusetts case,⁷ justly says: "Evidence of the plaintiff's general character was not offered; but only an attempt to blast his reputation by particular reports, which he might not have it in his power to silence but by commencing this prosecution. And if such reports could be given in evidence, the subject of them, however innocent, instead of seeking redress from the laws, had better sink privately under the weight of unmerited calumny, lest, by attempting his justification, he should give notoriety to slanders which had before been circulated only in whispers." In another Massachusetts case,⁸ Devens, J., says: "What the defendant sought to prove was, not the plaintiff's general reputation, which was the general character he had gained in the community by his course of life, but what was the common rumor as to a particular transaction, namely, his having stolen from Weld. The defendant sought to show, not that the plaintiff's general reputation was bad, but that in a single instance he was generally reputed to have behaved badly. This would have been to have proved the common talk as to an individual subject of scandal. A general report that the plaintiff is guilty of the particular crime with which he was charged cannot be received in evidence in mitigation of damages." In one of the latest cases on the subject,⁹ Henshaw, J., in delivering the opinion of the court, says: "The libelous articles contained in various forms the assertion of the existence of rumors reflecting on plaintiff. Thus: 'Rumors have been rife for many months that reflect on the management of the public business by the board

⁷ Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173.

⁹ Davis v. Hearst, 160 Cal. 143, 116 Pac. 530.

⁸ Mahoney v. Bedford, 132 Mass. 393.

of education.' 'Charges of favoritism in the award of public contracts have been hinted at time and again'; 'there have been ugly stories afloat of the alleged misconduct in office of men who were expected to be protecting the public school interests.' The court refused to admit evidence of the existence and character of these rumors, which evidence, it is insisted, was admissible in mitigation both on the question of compensatory damages, and to negative malice as the foundation for exemplary damages. For neither purpose, however, was the evidence admissible.'" From a perusal of the decisions it seems that in the states of Alabama, California, Georgia, Illinois, Iowa, Maine, Massachusetts, Missouri, New Hampshire, New York, Pennsylvania, Tennessee, and Wisconsin the evidence of rumors of the plaintiff being guilty of the fact charged in the slanderous statement has been held inadmissible.¹⁰ On the other hand, it is urged in those cases, which allow such evidence, that one who only gives currency to a report already in existence is not guilty of the same degree of malignity and does not cause so great an injury as one who is the prime author of the scandal. Such is practically the result of the decisions in Colorado, Connecticut, Delaware, Kentucky, Maryland, Michigan, Mississippi, New

¹⁰ Scott v. McKinnish, 15 Ala. 662; Preston v. Frey, 91 Cal. 107, 27 Pac. 533; Wilson v. Fitch, 41 Cal. 363; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Strader v. Snyder, 67 Ill. 404; Wallace v. Homestead Co., 117 Iowa, 348, 90 N. W. 835; Sickra v. Small, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9; Mahoney v. Belford, 132 Mass. 393; Peterson v. Morgan, 116 Mass. 350; Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173; Bodwell v. Swan, 3 Pick. (Mass.) 376; Aldermen v. French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114, note; Nelson v. Wallace, 48 Mo. App. 193; Moberly v. Preston, 8 Mo. 462; Anthony v. Stephens, 1 Mo. 254, 13 Am. Dec. 497; Knight v. Fos-

ter, 39 N. H. 576; Pallet v. Sargent, 36 N. H. 496; Dame v. Kenney, 25 N. H. 318; Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244; Morey v. Morning Journal, 123 N. Y. 207, 20 Am. St. Rep. 730, 9 L. R. A. 621, 25 N. E. 161; Kennedy v. Gifford, 19 Wend. (N. Y.) 296; Mapes v. Weeks, 4 Wend. (N. Y.) 659; Pease v. Shippen, 80 Pa. 513, 21 Am. Rep. 116; Hancock v. Stephens, 11 Humph. (Tenn.) 507; Newell on Defamation, § 70. In Iowa, Wallace v. Homestead Co., *supra*, may be taken as representing the law there, the cases of Marker v. Dunn, 68 Iowa, 720, 28 S. W. 38, and Bearsley v. Bridgman, 17 Iowa, 290, not being squarely in point.

Jersey, North and South Carolina, Ohio and Utah.¹¹ Although, according to our own opinion and by the weight of authority, this class of evidence is held inadmissible, there is certainly much force in the reasoning of the cases which hold that the prevalence of general rumors of the character of those uttered by the defendant is relevant as bearing both on the question of punitive and compensatory damages. This is especially true in those cases where the reports or suspicions of the plaintiff's guilt have become so general as to affect his general character; and a distinction should be made between evidence of *special rumors* and evidence of *general belief* and suspicion in the community that the plaintiff was guilty of the charge made. Nor need there be any difficulty in making the distinction for the reason that if the evidence be of special rumor, it is clearly inadmissible, while if it is of general rumors, it cannot be seriously said to be outside the general reputation which undoubtedly can be given in evidence in mitigation. Looking at the cases squarely, one is forced to the conclusion that there has been a deal of unnecessarily fine hair-splitting, in opinion, reporting and digesting; for the consideration of all the cases leads to no more definite location of the proposition than as we have stated it. A defendant is entitled to no mitigation by reason of having heard from someone that which he repeated. Except it was an invention of his own he must have so heard it. But it is quite a different thing if the whole neighborhood is agog with the news and the plaintiff's reputation generally in that neighborhood is being discussed—the news being in the ver-

¹¹ Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156, and note; Case v. Marks, 20 Conn. 248; Morris v. Barker, 4 Harr. (Del.) 520; Calloway v. Middleton, 2 A. K. Marsh. (Ky.) 372, 12 Am. Dec. 406; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Fowler v. Fowler, 113 Mich. 575, 71 N. W. 1084; Binns

v. Stokes, 27 Miss. 239; Stuart v. News Pub. Co., 67 N. J. L. 317, 51 Atl. 709; Cook v. Barkley, 1 Penn. (N. J.) 169, 2 Am. Dec. 343; Nelson v. Evans, 12 N. C. 9; Van Derveer v. Sutphin, 5 Ohio St. 293; Easterwood v. Quin, 2 Brev. (S. C.) 64, 3 Am. Dec. 700; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 35 L. R. A. 611, 45 Pac. 1097.

nacular public property. In an Indiana case of repute¹² the court said: "In our own state, all the authorities seem to be in accord that mere reports and rumors of guilt are not to be received, but that general rumors or reports of such guilt are admissible, but the ground of their admission is placed upon the fact that they throw light upon the character of the plaintiff, and its value." The reason for the distinction is plain. If before the speaking of the words complained of there exists a general rumor or suspicion that the party is guilty of the criminal act charged against him, the character is already traduced, and the evidence is in effect the same as that of general bad character in reference to the crime imputed, which is only admissible when the charge has obtained general notoriety, and a general belief or suspicion of its truth is entertained.¹³ For all practical purposes the classification of "rumors" might well be eliminated, for if they are what is called "special," and we interpret that to mean the chatter of one or two scandal-mongers, they do not affect the general reputation of the one slandered—and it is well that this is so, for possibly there exists no one whose actions have not been canvassed by those who take care that none shall "escape calumny"—while if they are so general as to affect the general reputation they are admissible under that head.¹⁴ Where the defendant at the time of publishing or repeating the charge names the person or persons from whom he has received the information, it has been held that he may show in mitigation that the sources of his information were as stated.¹⁵ But the defendant cannot show, for the purpose

¹² Gray v. Ellzroth, 10 Ind. 587, 53 Am. St. Rep. 400, 37 N. E. 551.

¹³ Blickenstaff v. Perrin, 27 Ind. 527.

¹⁴ Bowen v. Hall, 20 Vt. 232; Gray v. Ellzroth, 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551, and cases cited; Nicholson v. Merritt, 109 Ky. 369, 59 S. W. 25; Ledgerwood v.

Elliott (Tex. Civ. App.), 51 S. W. 872. See cases cited above.

¹⁵ Storey v. Early, 86 Ill. 461; Heilman v. Shanklin, 60 Ind. 424; Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74, and note; Williams v. Greenwade, 3 Dana (Ky.), 432; Young v. Slemmons, Wright (Ohio), 124; Galloway v. Courtney, 10 Rich.

of rebutting the charge of malice, the prevalence of reports similar to those repeated by him, unless he shows that such reports were *known and believed by him* at the time of uttering the slanderous words.¹⁶

§ 151 (150). Character—Actions for breach of promise of marriage—Unchastity as a defense.—The bad character of the plaintiff,¹⁷ in an action for breach of promise of marriage, is clearly in issue both as a defense and according to circumstances in mitigation of damages. But for defense purposes it has to be proven. The general reputation of a woman for unchastity is no bar to her action for breach of promise of marriage. To constitute unchastity a defense the defendant must not only prove her to be actually unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry.¹⁸ The rule in such cases is that if any man has been paying his addresses to one that he supposes to be a modest person, and afterward discovers her to be a loose

(S. C.) 414; *Edwards v. Kan. City Times*, 32 Fed. 813; *Rex v. Burdett*, 4 Barn. & Ald. 95, 106 Eng. Reprint, 873; *Mullett v. Hulton*, 4 Esp. 248; *Hunt v. Algar*, 6 Car. & P. 245; *Bennett v. Bennett*, 6 Car. & P. 588; *Mills v. Spencer*, Holt N. P. 533.

¹⁶ *Hatfield v. Lasher*, 81 N. Y. 246; *Hastings v. Stetson*, 130 Mass. 76; *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141, 30 N. W. 462.

¹⁷ We use the term "plaintiff" without prefixing the word "female," as the suit by a male plaintiff is very rare; but if such an action were brought, the character of a male plaintiff should be just as much in issue as that of a female. In one of the most recent cases, *Gross v. Hochstim*, 72 Misc. Rep. 343, 130 N. Y. Supp. 315, the male was the plaintiff and the defendant attacked his character. In overruling his demurrer to

the defense the court said: "The defense, however, when viewed as a whole, cannot be said to be insufficient in law upon the face thereof. The allegation therein contained that the plaintiff obtained moneys upon the false representation that said moneys were for the use of the firm of Sol. Gross & Co., is, I think, sufficient to sustain the defense. If, as we must assume, this allegation is true, then it imputes dishonesty to the plaintiff of so grave a character that it would in my judgment justify the defendant in her refusal to marry the plaintiff."

¹⁸ *Foster v. Hanchett*, 68 Vt. 319, 54 Am. St. Rep. 886, 35 Atl. 316. In this case a "loose woman" or a "woman of loose and immodest character" was interpreted to be an unchaste and sexually impure woman in the ordinary sense of the terms.

and immodest woman, he is justified in breaking any promise of marriage he may have made to her; but, to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account; and they must also be satisfied that the defendant did not know her character at the time of the promise; for, if a man knowingly promise to marry such person, he is bound to do so. And therefore if the plaintiff has been guilty of criminal intercourse with another, and such fact is unknown to the defendant at the time of the contract, he may prove it as a defense. Leaving for the present out of consideration unchastity for which the defendant is responsible, it makes no difference when the unchastity occurred, whether before or after the promise to marry so long as it was unknown to the defendant at the time of the promise¹⁹ in the former case, and that he did not waive it or acquiesce in it in the latter, but took the most expeditious method of rescinding and canceling his contract for that

19 *Espy v. Jones*, 37 Ala. 379; *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386; *O'Neill v. Beland*, 133 Ill. App. 594; *Sprague v. Craig*, 51 Ill. 288; *Burnett v. Simpkins*, 24 Ill. 264; *Butler v. Eschleman*, 18 Ill. 44; *Bell v. Eaton*, 28 Ind. 468, 92 Am. Dec. 329; *Williams v. Fahn*, 119 Iowa, 746, 94 N. W. 252; *Edmonds v. Hughes*, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467; *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, and note, 15 L. R. A. 531, 19 S. W. 5; *Berry v. Bakeman*, 44 Me. 164; *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. Rep. 561, 82 N. E. 28; *Boynnton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Markham v. Herrick*, 82 Mo. App. 327; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642; *Palmer v. Andrews*, 7 Wend. (N. Y.) 142, citing *Boynnton v. Kellogg*, 3

Mass. 189, 3 Am. Dec. 122; *Johnson v. Caulkins*, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; *Gaskill v. Dixon*, 3 N. C. 350; *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744; *Welker v. Metcalf*, 209 Pa. 373, 58 Atl. 687; *Von Storch v. Griffin*, 77 Pa. 504; *Van Storch v. Griffin*, 71 Pa. 240; *Capehart v. Carradine*, 4 Strob. (S. C.) 42; *Goodall v. Thurman*, 1 Head (Tenn.), 209; *Foster v. Hanchett*, 68 Vt. 319, 54 Am. St. Rep. 886, 35 Atl. 316; *Young v. Murphy*, 3 Bing. N. C. 54, 2 Hodges, 144, 16 L. J. C. P. 180, 3 Scott, 379, 32 Eng. Com. L. 35; *Bench v. Merrick*, 1 Car. & K. 463, 47 Eng. Com. L. 463; *Irving v. Greenwood*, 1 Car. & P. 350, 12 Eng. Com. L. 209; *Baddeley v. Mortlock*, Holt N. P. 151, 3 Eng. Com. L. 67; *Grant v. Cornock*, 16 Ont. App. 532; *McGregor v. McArthur*, 5 C. P. 493; *Burke v. Scribner*, 3 Pug. 652.

good reason. When a contract to marry is proved by the one or the other mode, the parties must be held liable for its breach precisely as that of any other contract, unless the evidence discloses facts absolving the party from its observance. If the want of virtue is relied on for that purpose, the knowledge of that fact must have been acquired after entering into the engagement, and defendant must have terminated it immediately upon being apprised of the fact, otherwise that will be considered as forming, on the part of the defendant, no objection.²⁰ An instruction, "If the defendant, in an action for breach of marriage contract, bases his renunciation of, and his right to a discharge from, his contract upon the bad or immoral conduct of the plaintiff, it must appear that his refusal to consummate his promise was due to such bad or immoral conduct, and that he renounced his promise as soon as he reasonably could after the conduct happened or was discovered by him. Dissolute conduct upon the part of the woman is no defense, if the man was a party to it or connived at it," has been held correct.²¹ But, as we have said, the unchastity for the purpose of defense must be proven. As a defense, mere evidence of the reputation of the plaintiff is not sufficient. The cases already cited show that the defendant must prove that the plaintiff is in fact what she is reputed to be. There are a few cases to the contrary. In a Louisiana decision,²² Slidell, J., remarking as a fact creditable to the state that it was the first case of the kind to come before their courts, said: "We would even go further and say, that a man who had promised marriage, should be

²⁰ *Espy v. Jones*, 37 Ala. 379; *Burnett v. Simpkins*, 24 Ill. 265; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Denslow v. Van Horn*, 16 Iowa, 476; *Snowman v. Wardwell*, 32 Me. 275; *Sheahan v. Barry*, 27 Mich. 217; *Palmer v. Andrews*, 7 Wend. (N. Y.) 142; *Young v. Murphy*, 3 Bing. (N. C.) 54; *Capehart v. Carradine*, 4 Strob. (S. C.) 42; *Foster v. Hanchett*, 68 Vt. 319, 54 Am. St. Rep. 886, 35

Atl. 316; *Irving v. Greenwood*, 1 Car. & P. 350; *Bench v. Merrick*, 1 Car. & K. 463.

²¹ *Bowman v. Bowman*, *supra*.

²² *Morgan v. Yarborough*, 5 La. Ann. 316. This case contains a learned dissertation on the history of *sponsatio* (promises of marriage among the Romans and other European nations).

excused from his promise if he could show that the general reputation of the other party was bad, even without proving that such general reputation was well founded; especially if he made the promise in ignorance of that reputation." In a Missouri case,²³ often cited as an authority for the admission of evidence of reputation, the court merely says: "But whether a bar to the action or not, the unchaste conduct of the plaintiff and the consequent bad reputation therefor were proper matter in mitigation of damages." In a comparatively recent case,²⁴ however, Bishop, C. J., says: "It is correct doctrine, most certainly, that where a man discovers after entering into a contract for marriage—the rule is the same, of course, the parties being reversed—that his fiancée is a woman of unchaste and immoral character, he may, at his election, renounce the contract, and may plead such fact in justification of his conduct in any court of law or equity. The principle involved is akin to that upon which the doctrine of implied warranty rests." To that extent the learned judge is undoubtedly correct. But his continuation of that proposition must be received with caution. He says: "It is to be said further that the rule is not weighed down by any requirement to the effect that specific proof must be made of specific acts of unchastity. It is sufficient if the woman is shown to be of bad character at the time of the contract, and that this was unknown to the defendant. Such being the facts, he may sever the relation with impunity. It is manifest that to such cases the doctrine of *caveat emptor* can have no application." We do not think any authority can be found to support this position. The law, as stated in a very old Massachusetts case,²⁵ is, that the defendant may give in evidence any instances of misconduct, but that he cannot go into an inquiry respecting the plaintiff's general character as a defense. This

²³ Markham v. Herrick, 82 Mo. App. 327.

²⁴ Williams v. Fahn, 119 Iowa, 252, 94 N. W. 252.

²⁵ Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

must be obvious from the very character of the defense. We are not at present dealing with the element of fraudulent concealment, and therefore say that in such cases, to use the language quoted, "*caveat emptor*" most certainly applies. If a man chooses to make an important contract like that of marriage without learning something of the other party to the contract, if he is in such haste to marry that he has not foreseen the leisure for repentance, then, in the absence of fraud, he is not permitted to set up that reputation of the other party, of which but for his own neglect he could have become cognizant. The unchastity of the plaintiff, therefore, in such cases means her unchastity, not her reputation, which, "chaste as ice, pure as snow," may yet not have escaped the foul breath of calumny. It hardly needed the approbation of authority to the proposition that it is no defense to an action for breach of promise to marry, that the unchastity of the plaintiff was created by or connived at by the defendant, and we refrain from quoting from the strong opinions that have been uttered. It would be allowing a defendant to take too liberal an advantage of his own wrong and duplicity if such were the case; and it matters not, in this respect also, where the actual date of the promise comes in. If it were before, then the defendant made the promise with his eyes open; if the misconduct were after, and he connived and acquiesced and did not cancel his engagement, then he cannot be heard on that ground of defense.²⁶ Where, however, the plaintiff has been guilty of fraud inducing defendant's promise to marry or of fraudulent concealment, these facts may be shown as justification for the refusal to perform the contract and furnish a good defense to an

²⁶ *Espy v. Jones*, 37 Ala. 379; *Butler v. Eschleman*, 18 Ill. 44; *Dunn v. Trout*, 87 Ill. App. 432; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Denslow v. Van Horn*, 16 Iowa, 476; *Snowman v. Wardwell*, 32 Me. 275; *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Berry v. Bakeman*, 44

Me. 164; *Rich v. Mayer*, 7 N. Y. Supp. 69, 26 N. Y. St. 107, 109; *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744; *Johnson v. Smith*, 3 Pittsb. (Pa.) 184; *Bench v. Merrick*, 1 Car. & K. 463, 47 Eng. Com. L. 463; *Irvine v. Greenwood*, 1 Car. & P. 350, 12 Eng. Com. L. 209.

action for breach of promise of marriage; and inasmuch as fraud opens the door wide to all inquiry, if the fraudulent representation were as to character, the inquiry, of course, should embrace the history and reputation of the plaintiff in that regard.²⁷ If a woman undertakes, without inquiry, to state to her suitor facts relating to her past history, or to her parentage or family, or to her former or present position, which were material, she is bound to state those facts truly, and not to suppress or conceal any facts which were necessary to a correct understanding on his part of the facts stated, and if she willfully concealed or suppressed such facts, and thereby led him to believe that the matters to which such statement related were different from what they actually were, she is guilty of fraudulent concealment entitling him to withdraw from the contract of marriage. So if she represents to him that she has obtained a divorce from her husband on the ground of his cruelty, and after an engagement to marry is entered into between her and such suitor, he discovers that in the suit for divorce there was a cross-bill charging her with being of a violent and ungovernable temper, and with having practiced a systematic course of violence and cruelty toward her husband, and having insulted him, and applied to him vile and profane epithets, and that the allegations of such cross-bill had been found to be true, the suppression of these facts con-

²⁷ Aortson v. Ridgway, 18 Ill. 23; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Atwood v. Chapman, 68 Me. 38, 40, 41, 28 Am. Rep. 5; Prentiss v. Russ, 16 Me. 30; Lewis v. Tapman, 90 Md. 294, 47 L. R. A. 385, 45 Atl. 459; Smith v. Smith, 171 Mass. 404, 68 Am. St. Rep. 440, 41 L. R. A. 800, 50 N. E. 933; Burns v. Dockray, 156 Mass. 135, 137, 30 N. E. 551; Short v. Currier, 153 Mass. 182, 26 N. E. 444; Potts v. Chapin, 133 Mass. 276; Van Houten v. Morse, 162 Mass. 414, 44 Am. St. Rep. 373, 26 L. R. A. 430, 38 N. E. 705; Kidney v. Stoddard, 7 Met. (Mass.) 252; Goddard v. West-

cott, 82 Mich. 180, 46 N. W. 242; Simmons v. Simmons, 8 Mich. 318; Gross v. Hochstin, 72 Misc. Rep. 343, 130 N. Y. Supp. 315; Devoe v. Brandt, 53 N. Y. 462; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Clark v. Baird, 9 N. Y. 183; Hill v. Gray, 1 Stark. 434; Stevens v. Adamson, 2 Stark. 422; Arkwright v. Newbold, 17 Ch. 301, 317, 318; Foote v. Hayne, 1 Car. & P. 545, R. & M. 165, 28 Rev. Rep. 788, 12 Eng. Com. L. 313; Wharton v. Lewis, 1 Car. & P. 529, 28 Rev. Rep. 785, 12 Eng. Com. L. 305.

stitutes fraudulent concealment justifying the suitor in refusing to perform the contract to marry. And if she undertakes to inform him about her parents and family, and tells him that they were a white family of high standing, when, in fact, they had negro blood in their veins, he is justified in refusing to marry her.²⁸ In the absence of fraud, the character of the plaintiff, save in respect of chastity, is not open to the defendant as an answer to the action, but only to mitigate the damages for his breach of the contract, as hereinafter appears; and the plaintiff has, whenever her character is attacked, the right to prove her good reputation. When the defendant in his answer and by his evidence attacks the plaintiff's reputation and character for chastity, evidence of her good character and reputation for chastity is admissible in rebuttal, but in rebuttal only.²⁹ If the defendant has, however, not attacked her character generally, but has only adduced specific instances of misconduct, it is clear she cannot go into her general character because, if his statements are untrue, she has the *data* on which to frame her answer to them.³⁰

²⁸ Van Houten v. Morse, 162 Mass. 414, 44 Am. St. Rep. 373, 26 L. R. A. 430, 38 N. E. 705.

²⁹ Smith v. Hall, 69 Conn. 651, 38 Atl. 386; Haymond v. Saucer, 84 Ind. 3; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745; Herriman v. Layman, 118 Iowa, 590, 92 N. W. 710; Leavitt v. Cutler, 37 Wis. 46.

³⁰ Colburn v. Marble, 196 Mass. 376, 124 Am. St. Rep. 561, 82 N. E. 28. In this case the following excerpt from the opinion of Sheldon, J., is valuable: "In our opinion the plaintiff ought not to have been allowed to prove in rebuttal her good reputation for chastity. The general principle is that in civil actions evidence of character or reputation is not admissible for the purpose of meeting evidence of specific acts of miscon-

duct: Day v. Ross, 154 Mass. 13, 27 N. E. 676. Cases in which the character of the plaintiff is put directly in issue, as in slander or libel, or in which evidence of general reputation may be received as bearing upon a question of notice or of probable cause, are not really exceptions to the rule. This rule is clearly stated with a full citation of authorities, in Geary v. Stevenson, 169 Mass. 23, 31, 47 N. E. 508. It was applied to an action for breach of promise of marriage, by the supreme court of Pennsylvania in Leckey v. Blosser, 24 Pa. 401. It has been applied in England to the analogous case of an action by a parent for the seduction of a daughter: Bamfield v. Massey, 1 Camp. 460; Dodd v. Norris, 3 Camp. 519. The defendant had merely attempted to show specific acts of unchastity on

§ 151a (151). **Same—Mitigation of damages.**—A totally different point of view is presented when the defendant attacks the plaintiff's character for the purpose of showing she is not entitled to the same damages as a pure woman; and if, without the fault of the defendant, the plaintiff by her subsequent indelicate conduct injures her reputation, this may be shown in mitigation of damages.³¹ So if the plaintiff prior to the promise was a person of poor character, this fact is relevant in mitigation of damages.³² But if she has been seduced first by the defendant under promise of marriage, he cannot be heard to prove her bad character. The rule was thus stated by the learned judges in a famous case:³³ Parker, J., said: "It appears, from the declaration in this case, that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than a bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced, by urging her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of our laws." Sedg-

the part of the plaintiff; he had not, by attacking her reputation, opened the field to her to offer evidence to support it, as in *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386. So far as the decisions in some other states go beyond the doctrine here adopted we do not regard them as sound."

³¹ *Palmer v. Andrews*, 7 Wend. (N. Y.) 142.

³² *Palmer v. Andrews*, 7 Wend. (N. Y.) 142; *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Clement v. Brown*, 57 Minn. 314, 59 N. W. 198. When proof of character is admissible, latitude as to time is allowed: *Rathburn v. Ross*, 46 Barb. (N. Y.) 127, 133.

³³ *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122.

wick, J., said: "It does appear to me that the defendant had every reasonable indulgence at the trial. To go further, and permit evidence of the plaintiff's general character, injured and degraded, as it necessarily was by the treatment she had received from the defendant, would be placing the other sex absolutely in the power of ours. It is not to be endured that a man should seduce a female, and ruin her character and standing in society, and when she comes to ask compensation for the injury, under which she is suffering, avail himself of her humiliation and disgrace, to diminish her claim of damages." A great deal of latitude is of course allowed to a defendant who admits his promise and says he is willing to pay for the breach of it that which is reasonable; and if the plaintiff's character suggested the defendant's breach, while it may not excuse him from his contract, he is allowed to show that she is not entitled to the same amount as if she had a clean record and he had broken his engagement capriciously. He may therefore show a want of chastity and generally acts which, though falling short of a bar to the action, nevertheless establish that she is not otherwise a pure woman above suspicion. If her actions have been wantonly indelicate and inconsistent with the conduct of a pure-minded woman, the facts are admissible in mitigation.³⁴ There is

³⁴ *Espy v. Jones*, 37 Ala. 379; *Brown v. Bannister*, 14 Haw. 34; *Burnett v. Simpkins*, 24 Ill. 264; *Boyn-ton v. Kellog*, 3 Mass. 189, 3 Am. Dec. 122; *Clemons v. Seba*, 131 Mo. App. 378, 111 S. W. 522; *Cole v. Holliday*, 4 Mo. App. 94; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Thorn v. Helmer*, 4 Abb. Dec. (N. Y.) 408, 2 Keyes (N. Y.), 27; *Button v. McCauley*, 1 Abb. Dec. (N. Y.) 282, 4 Transcr. App. (N. Y.) 447, 5 Abb. Pr., N. S. (N. Y.), 29; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Tompkins v. Wadley*, 3

Thomp. & C. (N. Y.) 424; *Johnson v. Caulkins*, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; *Palmer v. Andrews*, 7 Wend. (N. Y.) 142; *Kelley v. High-field*, 15 Or. 277, 14 Pac. 744; *Van Storch v. Griffin*, 71 Pa. 240; *Capehart v. Carradine*, 4 Strob. (S. C.) 42; *Williams v. Hollingsworth*, 6 Baxt. (Tenn.) 12; *Alberts v. Albertz*, 78 Wis. 72, 10 L. R. A. 584, 47 N. W. 95. The case of *Capehart v. Car-radine*, 4 Strob. (S. C.) 42, is hardly an authority that evidence as to woman's reputation acquired after the beginning of the action is inadmissible. What was excluded was hear-say evidence derived from a letter re-

ample authority that improper conduct *after* the breach of the contract may be given in evidence.³⁵ There is a half-hearted conflict as to whether evidence may be proven, in mitigation, of the plaintiff's unchastity with others than the defendant, when it was known to the defendant at the time of the promise; though we can see no good reason for any doubt upon the subject. If he knew of the circumstances, he has no right to have the damages lessened by reason of it. If we may strike a balance between the parties, knowledge on his part weighs against the frailty of the woman, and he should be estopped from claiming it as a mitigating element. He should not be allowed to mitigate damages by reason of conduct and character which, being known to him at the time of making the promise, constituted no objection in his mind and feelings to entering into the contract itself.³⁶

ceived by a witness, who was to testify as to her reputation therefrom. It is, however, useful as authority that the defense of the plaintiff's bad reputation was unknown to the defendant at the date of the promise to marry.

35 Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Keegan v. Sage, 31 Abb. N. C. (N. Y.) 54; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

36 Butler v. Eschleman, 18 Ill. 44; Espy v. Jones, 37 Ala. 379. In *Burnett v. Simpkins*, 24 Ill. 264, the case responsible for the slight divergence of opinion, the court said: "If the want of virtue on the part of the plaintiff was known to defendant at the time, it forms no grounds of defense to the action, but it may be shown in mitigation, for the reason that its breach does not result in the same injury as if the character had been good." But the statement is partially controlled by the succeeding sentences: "And we regard this

as especially true, when the plaintiff seeks to enhance the damages by giving evidence of a seduction resulting from the contract. If she may thus aggravate the damages, the defendant must be permitted to show that she was, previous to the engagement, and without any act of his, wanting in virtue, in order to avoid such increased damages. If, at the time of making the contract, she was virtuous, and it was by the act of the defendant she ceased to be so, then he cannot be heard to prove the want of virtue in mitigation. But if she has previously, or during the continuance of the engagement, prostituted her person to another, and the defendant has, with a knowledge of the fact, entered into the contract, or continued it, he may show the fact in mitigation." This case was followed in *Denslow v. Van Horn*, 16 Iowa, 476, but we cannot regard it as sound. The English authorities cited in it are not to the point.

§ 152 (151). **Same—Seduction and criminal conversation.**—The rules laid down in actions for breach of promise of marriage apply *mutatis mutandis* to those for seduction and criminal conversation in which the character of the woman seduced is in issue. In such actions one element of damage is the wounded sensibility of the injured party, and another is the loss of society of the daughter or wife. Hence the damage is manifestly less if the daughter or wife was a person of disparaged fame before the wrong.³⁷ In an action by a seduced woman for her own seduction, although previous chastity is not necessary to maintain the action, yet evidence of her prior unchastity is admissible in mitigation of damages, and specific acts of intercourse with other men may be shown.³⁸ So in an action by the father of the seduced female, her character for chastity is in issue, and prior unchastity may be proved, not only to corroborate the defendant where he denies the seduction, but also in mitigation of damages.³⁹ In such cases evidence is admissible not only of general bad character for chastity, but of *specific acts* of intercourse with other men,⁴⁰ even though such former acts of unchastity

³⁷ Carder v. Forehand, 1 Mo. 704, 14 Am. Dec. 317, and note; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159, and note; Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539; Commonwealth v. Merriam, 14 Pick. (Mass.) 518, 25 Am. Dec. 420, 422, and note.

³⁸ Smith v. Milburn, 17 Iowa, 30; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696; White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Akerley v. Haines, 2 Caines (N. Y.), 292; White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Patterson v. Hayden, 17 Or. 238, 11 Am. St. Rep. 822, 3 L. R. A. 529, 21 Pac. 129; Love v. Masoner, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522; Reed v. Williams, 5 Sneed (Tenn.), 580, 73 Am. Dec. 157.

³⁹ Drish v. Davenport, 2 Stew. (Ala.) 266; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Shattuck v. Myers, 13 Ind. 46, 74 Am. Dec. 236; Carder v. Forehand, 1 Mo. 704, 14 Am. Dec. 317; Hogan v. Cregan, 6 Rob. (N. Y.) 138.

⁴⁰ White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. 691; Robinson v. Powers, 129 Ind. 480, 28 N. E. 1112; Clouser v. Clapper, 59 Ind. 548; Kesselring v. Hummer, 130 Iowa, 145, 106 N. W. 501; Conway v. Nicol, 34 Iowa, 533; Smith v. Milburn, 17 Iowa, 30; Greenman v. O'Riley, 144 Mich. 534, 115 Am. St. Rep. 466, 108 N. W. 421; Clemons v. Seba, 131 Mo. App. 378, 111 S. W. 522; Sanborn v. Neilson, 4 N. H. 501; Harter v. Crill, 33 Barb. (N. Y.) 283; Patterson v.

were not known to the defendant or to the public.⁴¹ The unchastity of the woman may be proven for two purposes, one as tending to show that she was not seduced; that she did not yield by reason of any influences, promises, arts, or means brought to bear upon her by the man, but yielded on account of her own lust and want of chastity. It is also proper in mitigation of damages.⁴² It is error to exclude evidence of previous lascivious conduct on the part of the girl. One of the considerations entering into the question of damages is the supposed loss on the part of the parent of the society of a chaste and pure daughter. If, therefore, the daughter had already become impure, the loss in that respect would be much less. All the authorities concur that such evidence is admissible.⁴³ The character of the plaintiff is always in direct issue, for the defendant is practically charged with blasting it, and therefore she must come into court prepared for the strict challenge which the law allows.⁴⁴ The daughter's general moral character cannot be attacked, but only her character for chastity, and that only where the father asks for damages to his feelings. And it is held that evidence of the daughter's reputation for chastity among a particular class of people is inadmissible.⁴⁵ Specific acts of intercourse by the daughter with other men may be shown by the testimony of those who have had intercourse with her, or by other evidence;⁴⁶ but it has been held that she her-

Hayden, 17 Or. 238, 11 Am. St. Rep. 822, 3 L. R. A. 529, 21 Pac. 129; Torre v. Summers, 2 Nott & McC. (S. C.) 267, 10 Am. Dec. 597; Love v. Masoner, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522.

⁴¹ Love v. Masoner, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522; Verry v. Watkins, 7 Car. & P. 308.

⁴² Robinson v. Powers, 129 Ind. 480, 28 N. E. 1112.

⁴³ Bracy v. Kibbe, 31 Barb. (N. Y.) 273; 1 Greenl. Ev., § 54; 2 Greenl. Ev., § 577; 1 Phil. Ev., Edw. ed., 760.

⁴⁴ Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52, 16 S. W. 4; West v. Druff, 55 Iowa, 335, 7 N. W. 636; Stowers v. Singer, 113 Ky. 584, 68 S. W. 637; Carson v. Slattery, 123 La. 825, 49 South. 586; Clemons v. Seba, 131 Mo. App. 378, 111 S. W. 522.

⁴⁵ Wallace v. Clark, 2 Over. (Tenn.) 93, 5 Am. Dec. 654; Drish v. Davenport, 2 Stew. (Ala.) 266.

⁴⁶ White v. Murland, 71 Ill. 250, 22 Am. Rep. 100; Bracy v. Kibbe, 31 Barb. (N. Y.) 273; Verry v. Watkins, 7 Car. & P. 308; 2 Greenl. Ev., § 577.

self is not bound to answer such questions.⁴⁷ Prior acts of unchastity, though unknown to the public and to the defendant at the time of the seduction, can be given in mitigation of damages.⁴⁸ Where the plaintiff had been seduced, and afterward lived an exemplary life for some years and was again seduced, her right of action has been held to be unimpaired.⁴⁹ A very strong case comes from Iowa where the original seduction was by the same man, the girl having lived a clean life till he met her again. The court, in affirming the judgment in her favor, said that if the previous relations between the parties were such as to give the defendant an advantage and power over plaintiff which he would not otherwise have had, it was an important consideration in determining whether the yielding of the plaintiff was inconsistent with previous chastity of character and purpose.⁵⁰ In actions of this kind it has

⁴⁷ *Vaughn v. Perine*, 2 Penn. (N. J.) 728, 4 Am. Dec. 411; *Brown v. Kingsley*, 38 Iowa, 220; *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316; *Hoffman v. Kemerer*, 44 Pa. 452 (this latter case deciding that such questions may not be asked); *Dodd v. Norris*, 3 Camp. 519; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232; *Hoffman v. Kemerer*, 44 Pa. 452; *Doyle v. Jessup*, 29 Ill. 460. This rule is put in some of these cases on the ground that specific acts of intercourse cannot be shown as evidence of bad character; but it is obvious that this would exclude all evidence of specific acts, which, as we have seen, is contrary to the authorities. Perhaps the true doctrine is that the witness is merely privileged from answering. Where the question bears upon the paternity of the child alleged to have been the fruit of the seduction, it is held, in *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232, that the female may be cross-exam-

ined as to illicit intercourse with other parties, in an action brought by herself. These cases must be read by the light of subsequent legislation. See discussion of *Vaughn v. Perine*, *supra*, in notes to § 835, *post*.

⁴⁸ *Love v. Masoner*, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522. In this case, where a female sued for her own seduction, it was held that she might be cross-examined as to intercourse with other men, because fornication was not a crime in that state. Where the female has stated at other times that she has had intercourse with other persons, she may be impeached by showing such statements, after cross-examination, as to having made them: *Andrews v. Askey*, 8 Car. & P. 7; *Carpenter v. Wall*, 3 P. & D. 457, 11 Ad. & El. 803, 113 Eng. Reprint, 619.

⁴⁹ *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Smith v. Milburn*, 17 Iowa, 30.

⁵⁰ *Fisher v. Bolton*, 148 Iowa, 651, 127 N. W. 979, approving *Baird v. Boehner*, 77 Iowa, 622, 42 N. W. 454.

been held that the bad *character of the husband or father*, bringing the action, is relevant to the issue when it affects him in his marital relations or in the character in which he sues.⁵¹ But in other cases, in actions for seduction brought by the father, such evidence has been rejected. In rendering a decision upon this subject a judge of the court of appeals of New York used the following language: "But to justify evidence of bad reputation in general or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law."⁵² There appears to be a conflict in the cases on the subject; some holding that specific habits of the parent may be testified to but not general, some the reverse, and some with minor variations, and others refusing to admit the evidence at all save as it affects him in the character in which he sues.⁵³ In the Missouri case cited in the notes, the court was at some pains to dispel a false idea that an English case sanctioned the introduction of "proof of profligate principles and dissolute habits of plaintiff himself," an expression which has found its way into some of the books. We append in the notes the learned judge's remarks, and think that the law as expressed in Missouri and New York is the sounder;⁵⁴ and that evidence relating

In that state, too, a right of action is given to a girl, though unchaste, in which she recovers her actual damages excluding any for loss of character. It is practically an action on the case: *Olson v. Rice*, 140 Iowa, 630, 119 N. W. 84.

⁵¹ *Harrison v. Price*, 22 Ind. 165; *Norton v. Warner*, 9 Conn. 172.

⁵² *Grider v. Dent*, 22 Mo. 490; *Dain v. Wyckoff*, 7 N. Y. 191, 18 N. Y. 45, 72 Am. Dec. 493, and note; *Robinson v. Burton*, 5 Harr. (Del.) 335. So in an action for enticing away hus-

band or wife, the bad character of the plaintiff may be shown in mitigation of damages: *Hardwick v. Hardwick*, 130 Iowa, 230, 106 N. W. 639.

⁵³ *Robinson v. Burton*, 5 Harr. (Del.) 335; *Thompson v. Glendening*, 1 Head (Tenn.), 287; *Reed v. Williams*, 5 Sneed (Tenn.), 580, 73 Am. Dec. 157; *Harrison v. Price*, *supra*; *Norton v. Warner*, *supra*.

⁵⁴ The case of *Dodd v. Norris*, 3 Camp. 519, does not support the doctrine contended for by Greenleaf in his work on the law of Evidence

to the character of the father or husband should not be admitted unless it affects him in the character in which he sues, and that this doctrine has in support the best authority.

§ 153 (152). **Same—Actions for bastardy.**—When it is recognized that bastardy is a proceeding for the support of the offspring—as a general rule—of a single woman, no attention need be directed to those cases which have held it relevant to prove the bad reputation of the prosecutrix for chastity in actions therefor.⁵⁵ They have been overwhelmed by the weight of the rule that such testimony is absolutely inadmissible. In such cases the very nature of the proceeding is at least to some extent an admission of unchastity on the part of the prosecutrix; and the testimony of witnesses as to her general character would only divert attention from the principal question to be tried, without any benefit or progress to the matter under consideration. Its total irrelevancy is apparent. The character for chastity of a woman who appears in court to affiliate her bastard child is pretty effectually impeached without any further proof on the subject.⁵⁶ So far as her credit may be impeached by evidence of general bad character,⁵⁷ the rule, of course, is not applicable, but with

(vol 2, p. 476, § 579). Lord Ellenborough would not suffer the plaintiff's counsel to introduce evidence as to the character of the plaintiff's daughter, who had been seduced. He observed that "the law considered this an action of trespass for assaulting the daughter, whereby the parent lost her service; and, although by some anomaly, when the loss of service was established, a further compensation was allowed for the injury to the parental feelings, it was necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be entirely lost sight of." There is nothing

about "proof of profligate principles and dissolute habits of plaintiff himself" in the whole case. See Missouri and New York cases cited in note 52, *supra*.

⁵⁵ Short v. State, 4 Harr. (Del.) 568; Sword v. Nestor, 3 Dana (Ky.), 452, 453.

⁵⁶ Bookhout v. State, 66 Wis. 415, 28 N. W. 179.

⁵⁷ Lusk v. State, 129 Ala. 1, 30 South. 33; Robnett v. People, 16 Ill. App. 299; Walker v. State, 6 Blackf. (Ind.) 1; State v. Meier, 140 Iowa, 540, 118 N. W. 792; State v. Granger, 87 Iowa, 355, 54 N. W. 79; State v. Ginger, 80 Iowa, 574, 46 N. W. 657;

regard to her unchastity, the authorities with the insignificant exceptions referred to are unanimous.⁵⁸ For similar reasons it is irrelevant in such actions to prove the reputation of the prosecutrix as a common prostitute.⁵⁹ Of

State v. Read, 45 Iowa, 469; *Sword v. Nestor*, 3 Dana (Ky.), 453; *Odewald v. Woodsum*, 142 Mass. 512, 8 N. E. 347; *People v. Wilson*, 136 Mich. 298, 99 N. W. 6; *Force v. Martin*, 122 Mass. 5; *Lord v. Schweiring*, Thach. Crim. Cas. (Mass.) 26; *State v. Floyd*, 35 N. C. 382; *State v. Patton*, 27 N. C. 180; *State v. Coatney*, 8 Yerg. (Tenn.) 210; *Sterling v. Sterling*, 41 Vt. 80; *Sweet v. Sherman*, 21 Vt. 23.

⁵⁸ *Rawles v. State*, 56 Ind. 433; *Walker v. State*, 6 Blackf. (Ind.) 1; *State v. SeEVERS*, 108 Iowa, 738, 78 N. W. 705; *State v. Borie*, 79 Iowa, 605, 44 N. W. 824; *State v. Karver*, 65 Iowa, 53, 21 N. W. 161; *Sidelinger v. Bucklin*, 64 Me. 371; *Paull v. Padelford*, 16 Gray (Mass.), 263; *Commonwealth v. Moore*, 3 Pick. (Mass.) 194; *Phillips v. Hoyle*, 4 Gray (Mass.), 568; *People v. Wilson*, 136 Mich. 298, 99 N. W. 6; *Anonymous*, 37 Miss. 54; *State v. Giles*, 103 N. C. 391, 9 S. E. 433; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Clow v. Smith*, 85 Neb. 668, 124 N. W. 140; *Morse v. Pineo*, 4 Vt. 281; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *Bookhout v. State*, 66 Wis. 415, 28 N. W. 179; *Duffies v. State*, 7 Wis. 672. The authorities are reviewed in *Bookhout v. State*, *supra*. In Iowa the code permits the general moral character of a witness to be attacked for the purpose of impeaching his testimony: See *State v. Woodworth*, 65 Iowa, 141, 21 N. W. 490. But in *Rawles v. State*, 56 Ind. 433, it was held that even though the code of that state provides that, in all questions affecting the credibility of

a witness, his general moral character may be given in evidence, yet in a bastardy case the inquiry must be confined to the time of trial, and, furthermore, that particular inquiry as to the reputation of the prosecutrix for chastity will not be entered upon. See, also, *Sidelinger v. Bucklin*, 64 Me. 371; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *Morse v. Pineo*, 4 Vt. 281.

⁵⁹ *Morse v. Pineo*, 4 Vt. 281; *Sidelinger v. Bucklin*, 64 Me. 371; *Duffies v. State*, 7 Wis. 672; *Commonwealth v. Churchill*, 11 Met. (Mass.) 538, 45 Am. Dec. 229, and note; *Rinehart v. State*, 23 Ind. App. 419, 55 N. E. 504. The last-named case has an important bearing on the possibility of a prostitute, who has had indiscriminate sexual intercourse at about the time of her pregnancy, to say who was the father of her child. The prosecutrix testified that within a very short time after one of her menstrual periods, appellant had sexual intercourse with her several times, and that that was when she became pregnant. She testified that at or about that time she did not have such relations with any other man. It was shown by the evidence of a physician that a woman was more apt to become pregnant soon after a menstrual period than at any other time. "The evidence also shows that the child was born after the full period of gestation, running from the time when she says she had such intercourse with appellant soon after one of her menstrual periods. There is also evidence in the record from which the jury could have found that appellant had admitted that he was

course, like that of any other witness, the reputation of the prosecutrix for truth and veracity may be impeached; and it is the general rule that no act of sexual intercourse between the complainant and any other man than the defendant is admissible in evidence, unless it is so near in time as to afford some evidence that it resulted in begetting the child named in the complaint. In cases of this kind, the admissibility of evidence of illicit intercourse of the complainant with any man other than the defendant depends upon its relation to the time when the child was born.⁶⁰ Evidence, therefore, is relevant which tends to show that, at or about the time the child was begotten, she had sexual intercourse with some other person than the accused.⁶¹ Such evidence may be elicited from the prose-

the father of the child. But our courts have gone so far as to say, "There is no doubt, however, that there are or may be circumstances enabling a female to determine to which of two or more connections her conception is due": *Goodwine v. State*, 5 Ind. App. 63, 31 N. E. 554; *Kintner v. State*, 45 Ind. 175.

⁶⁰ In *Eddy v. Gray*, 4 Allen (Mass.), 435, where the intercourse offered to be proved occurred more than ten months before the birth, the evidence was held to be inadmissible, without proof that the period of gestation was prolonged beyond the usual duration. We see no reason why the same rule should not be followed where the intercourse offered to be proved took place less than seven and a half months before the birth, in the absence of any proof that the birth was premature: *Ronan v. Dugan*, 126 Mass. 176.

⁶¹ *Allred v. State*, 151 Ala. 125, 44 South. 60; *Williams v. State*, 113 Ala. 58, 21 South. 463; *Belford v. State*, 96 Ark. 274, 131 S. W. 953, 955; *In re Gird*, 157 Cal. 534, 547, 137 Am. St. Rep. 131, 108 Pac. 499; *Stahl v. State*,

67 Kan. 864, 74 Pac. 238; *Zimmerman v. People*, 117 Ill. App. 54; *Holcomb v. People*, 79 Ill. 409; *Hobson v. People*, 72 Ill. App. 436; *Scharf v. People*, 34 Ill. App. 400; *State v. Breeden*, 41 Ind. App. 370, 83 N. E. 1020; *Benham v. State*, 91 Ind. 82; *Meyneke v. State*, 68 Ind. 401; *Walker v. State*, 6 Blackf. (Ind.) 1; *Goodwine v. State*, 5 Ind. App. 63, 31 N. E. 554; *State v. Meier*, 140 Iowa. 540, 118 N. W. 792; *State v. SeEVERS*, 108 Iowa, 738, 78 N. W. 705; *State v. Johnson*, 89 Iowa, 1, 56 N. W. 504; *State v. Ginger*, 80 Iowa, 574, 46 N. W. 657; *State v. Woodworth*, 65 Iowa, 141, 21 N. W. 490; *State v. Read*, 45 Iowa, 469; *Stahl v. State*, 67 Kan. 864, 74 Pac. 238; *Scantland v. Commonwealth*, 6 J. J. Marsh. (Ky.) 585; *Ginn v. Commonwealth*, 5 Litt. (Ky.) 300; *Low v. Mitchell*, 18 Me. 372; *Easdale v. Reynolds*, 143 Mass. 126, 9 N. E. 13; *Ronan v. Dugan*, 126 Mass. 176; *Sabins v. Jones*, 119 Mass. 167; *Commonwealth v. Moore*, 3 Pick. (Mass.) 194; *People v. Kaminsky*, 73 Mich. 637, 41 N. W. 833; *Hamilton v. People*, 46 Mich. 186, 9 N. W. 247; *Anonymous*, 37 Miss. 54; *State v.*

cutrix on cross-examination.⁶² It should, of course, be limited, as above referred to, to relevant times.

§ 154 (153). **Character in actions for fraud.**—Where the nature of a civil action does not involve the general character of a party, evidence as to that character cannot be offered to contradict an imputation of dishonesty, or even of fraud. The transaction presented in an ordinary civil case must depend upon its circumstances, and not upon the character of the parties. In such a case, no matter how serious a moral delinquency may be involved in a fact and how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact.⁶³ The doctrine has been announced in a few cases that, if a party is charged with fraud or other act involving moral turpitude and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good character.⁶⁴ Greenleaf has said: "And generally in ac-

O'Rourke, 85 Neb. 639, 124 N. W. 138; Clow v. Smith, 85 Neb. 668, 124 N. W. 140; Erickson v. Schmill, 62 Neb. 368, 87 N. W. 166; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823; Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382; People v. Schildwachter, 87 Hun (N. Y.), 363, 34 N. Y. Supp. 352, 68 N. Y. St. 436; State v. Warren, 124 N. C. 807, 32 S. E. 552; State v. Giles, 103 N. C. 391, 9 S. E. 433; State v. Bennett, 75 N. C. 305; State v. Parish, 83 N. C. 613; State v. Britt, 78 N. C. 439; Ely v. Ott, 14 Ohio C. C. 619, 7 Ohio Cir. Dec. 677; Commonwealth v. Fritz, 4 Pa. L. J. Rep. 219; Crawford v. State, 7 Baxt. (Tenn.) 41; Knight v. Morse, 54 Vt. 432; Sterling v. Sterling, 41 Vt. 80; Fall v. Overseers, 3 Munf. (Va.) 495; Swisher v. Malone, 31 W. Va. 442, 7 S. E. 439; Johnson v. State, 133 Wis. 453, 113 N. W. 674; Bookhout v. State, 66 Wis. 415, 28 N. W. 179; Humphrey

v. State, 78 Wis. 569, 47 N. W. 836; Duffies v. State, 7 Wis. 672; United State v. Collins, 1 Cranch C. C. (U. S.) 592, 25 Fed. Cas. No. 14,835. In actions for *indecent assault*, the inquiry cannot extend beyond acts of lewdness which quite necessarily evidence looseness in sexual morals: Barton v. Bruley, 119 Wis. 326, 96 N. W. 815; Gore v. Curtis, 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314.

⁶² McChesney v. State, 5 Ind. App. 425, 32 N. E. 339; Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382; Duffies v. State, 7 Wis. 672; United States v. Collins, 1 Cranch, 592, Fed. Cas. No. 14,835 (in this case the court limited the inquiry to a period not more than twelve nor less than six months before the birth of the child).

⁶³ Smets v. Plunket, 1 Strob. (S. C.) 372.

⁶⁴ Henry v. Brown, 2 Heisk. (Tenn.) 213; State v. Beebe, 17 Minn.

tions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it."⁶⁵ But this view is contrary to the clear weight of authority, and does not seem to be based upon any recognized principle of the law of evidence. Instances are constantly arising, both in actions in tort and contract, where the motives of parties are called in question; but this fact does not, in any legal sense, render the general character of such parties relevant to the issue. It is a far safer rule that, in conformity to general rules of evidence in civil cases, each transaction should be ascertained by its own circumstances and not by the character of the parties. The rule may be considered as settled that in civil suits evidence of character is not admissible except where it is directly in issue, and when from the nature of the issue such evidence is of special importance. Whether the act charged or complained of be indictable or not is not material.⁶⁶

§ 155 (154). Same—Illustrations.—The law as stated in the last section is that which now prevails, and illustrations are given in which such evidence has been held inadmissible, although fraud or other misconduct is imputed.

241; *Townsend v. Graves*, 3 Paige, 455; *Walker v. Stephenson*, 3 Esp. 284; *Ruan v. Perry*, 3 Caines (N. Y.), 120 (overruled in later cases). In Tennessee there is a disposition still to admit such evidence: *Continental Nat. Bank v. Nashville etc. Bank*, 108 Tenn. 374, 68 S. W. 497; *Hein v. Holdridge*, 78 Minn. 468, 81 N. W. 522; *Warner v. Warner*, 69 N. H. 137, 44 Atl. 908.

⁶⁵ Greenl. Ev., § 54.

⁶⁶ *Ward v. Herndon*, 5 Port. (Ala.) 382; *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *McBean v. Fox*, 1 Ill. App. 177; *Continental Ins. Co. v. Jaehnichen*, 110 Ind. 59,

59 Am. Rep. 194, 10 N. E. 636; *Simpson v. Westenberger*, 28 Kan. 756, 42 Am. Rep. 195; *Potter v. Webb*, 6 Me. 14; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *Heywood v. Reed*, 4 Gray (Mass.), 574; *Klein v. Bayer*, 81 Mich. 233, 45 N. W. 991; *Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273; *Rosenagle v. Handley*, 157 Pa. 107, 25 Atl. 42; *American Fire Ins. Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605; *Anderson v. Long*, 10 Serg. & R. (Pa.) 55; *Bedenbaugh v. Southern R. Co.*, 69 S. C. 17, 48 S. E. 53; *Fire Assn. v. Jones* (Tex. Civ. App.), 40 S. W. 44; *Landa v. Obert*, 5 Tex. Civ. App. 620, 25 S. W. 342; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

This evidence has been held irrelevant in actions for *robbery*;⁶⁷ to set aside the *probate* of a will on the ground of fraud;⁶⁸ on an *insurance* policy, when the defense was overvaluation;⁶⁹ for *fraudulent burning* of the property;⁷⁰ for *false representation* as to the solvency of another;⁷¹ for incurring a debt or other obligation;⁷² for *maliciously burning property*;⁷³ for *assault and battery*;⁷⁴ for *embezzlement*;⁷⁵ for *malicious mischief*;⁷⁶ for *fraudulent conveyance* of property;⁷⁷ for *criminal conversation*;⁷⁸ for *false arrest and imprisonment*;⁷⁹ for *malicious prosecution*;⁸⁰ for *divorce* on the ground of adultery;⁸¹ for *fraudulent appropriation* of property;⁸² in an action on *contract for labor*;⁸³ for *keeping a bawdy-house*;⁸⁴ and for procuring a deed by *fraud*.⁸⁵ In many of the cases above mentioned the evidence was circumstantial in its nature, and it is evident that in many of them the charges of fraud or other mis-

⁶⁷ *Morris v. Hazelwood*, 1 Bush (Ky.), 208.

⁶⁸ *Potter v. Webb*, 6 Greenl. (Me.) 14.

⁶⁹ *Fowler v. Aetna Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

⁷⁰ *Munkers v. Insurance Co.*, 30 Or. 211, 46 Pac. 850; *Schmidt v. New York Ins. Co.*, 1 Gray (Mass.), 529; *American Fire Ins. Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605.

⁷¹ *Gough v. St. John*, 16 Wend. (N. Y.) 646.

⁷² *Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273.

⁷³ *Barton v. Thompson*, 56 Iowa, 571, 41 Am. Rep. 119, and note, 9 N. W. 899; *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61.

⁷⁴ *Markey v. Angell*, 22 R. I. 343, 47 Atl. 882; *Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859; *Day v. Ross*, 154 Mass. 14, 27 N. E. 676.

⁷⁵ *Adams v. Elseffer*, 132 Mich. 100, 92 N. W. 772; *Wright v. McKee*, 37

Vt. 161; *Home Lumber Co. v. Hartman*, 45 Mo. App. 647.

⁷⁶ *Thayer v. Boyle*, 30 Me. 475.

⁷⁷ *Vansickle v. Shenk*, 150 Ind. 413, 50 N. E. 381; *Church v. Drummond*, 7 Ind. 17; *Curtis v. Hoadley*, 29 Kan. 566.

⁷⁸ *Pratt v. Andrews*, 4 N. Y. 493.

⁷⁹ *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508.

⁸⁰ *Rogers v. Lamb*, 3 Blackf. (Ind.) 155; *Baker v. Hopkins*, 1 A. K. Marsh. (Ky.) 587.

⁸¹ *Humphrey v. Humphrey*, 7 Conn. 116. (In *Hilker v. Hilker*, 153 Ind. 425, 55 N. E. 81, where the wife's chastity was attacked, she was permitted to give evidence of general reputation.)

⁸² *Smets v. Plunket*, 1 Strob. (S. C.) 372.

⁸³ *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244.

⁸⁴ *Johnson v. Carnley*, 10 N. Y. 570, 61 Am. Dec. 762.

⁸⁵ *Norris v. Stewart*, 105 N. C. 455, 18 Am. St. Rep. 917, 10 S. E. 912.

conduct were so serious, if believed, as to seriously affect the reputation of the litigants. To some extent the reputation of parties is liable to be affected by any litigation; but this is not ground on which evidence of character is held material in such actions as slander, seduction and others which have already been referred to. Other objections to the class of evidence under discussion were well stated in a South Carolina case: "If in every case where an act of dishonesty is imputed the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case."⁸⁶ It may be added that since the general adoption of the rule allowing witnesses to testify fully in their own behalf, there is even less reason than formerly for admitting testimony of this class. Care must be exercised in using cases which followed what was regarded as the leading case on the subject,⁸⁷ and which was later overruled.⁸⁸

§ 156 (154). Same—Homicide.—The character which the deceased bore for violence plays a very important part in the fate of his slayer under certain circumstances. Evidence of the turbulent, bloodthirsty, and dangerous character of the deceased is admissible, when there is testimony tending to establish that the accused acted in self-defense, where some overt act on the part of deceased is shown, calculated to impress his slayer with the reasonable belief that he is in danger of suffering grievous bodily harm or

⁸⁶ *Smets v. Plunket*, 1 Strob. (S. C.) 372.

⁸⁷ *Ruan v. Perry*, 3 Caines (N. Y.), 120.

⁸⁸ *Gough v. St. John*, 16 Wend. (N. Y.) 646; *Fowler v. Aetna Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460. The decision in *Bowerman v. Bowerman*, 76 Hun, 46, 27 N. Y. Supp. 579,

does not disturb this, as in that case the man to whom the fraud was imputed was dead and the evidence which all came from interested parties entirely circumstantial, and the court limited their expression to the circumstances of that particular case to permit the evidence of his reputation.

death, and there is no reasonable mode of escape; and this for the purpose of determining who was the aggressor. In the absence of such an act on the part of the deceased, his character for turbulence and violence is wholly irrelevant.⁸⁹ Therefore, the relevancy of such evidence is strictly limited to the matter of self-defense. In some states there is statutory provision on the subject, but outside of such provisions there are so many diversities of opinion that the end is better gained by showing what conclusions are supported by the weight of authority. The relevancy of the deceased's violent character on the issue of self-defense is generally admitted to be the law for the purpose of throwing light upon the killing, the demeanor of the parties and particularly the just apprehensions of the accused.⁹⁰ It is also relevant to remove a doubt as to who

⁸⁹ *Green v. State*, 143 Ala. 2, 39 South. 362 (Tyson, J., who so declared the law in this case, added: It has never been the law in this jurisdiction that, because a man has the reputation of being turbulent and violent, his life may be taken. On the contrary, it has been uniformly held that, whatever may be a man's character for desperation and recklessness, he is entitled to the protection of the law; and it is as much a crime in the eye of the law to slay him as it is the most peaceable and law-abiding citizen in the community. Evidence, therefore, of the character of the deceased for violence and the like, when properly admitted, is limited in its consideration by the jury to determining solely the meaning of his overt act or demonstration). *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771, has been overruled, though not expressly, by the later Alabama cases. On the general subject of character and reputation of the deceased on trials for homicide, see note to *State v. Feeley*, 3 L. R. A., N. S., 352.

⁹⁰ *Patterson v. State*, 156 Ala. 62, 47 South. 52; *Green v. State*, 143 Ala. 2, 39 South. 362; *Perry v. State*, 94 Ala. 25, 10 South. 650; *Pate v. State* (Ala.), 50 South. 357; *Eiland v. State*, 52 Ala. 322; *Palmore v. State*, 29 Ark. 248; *State v. Lee* (Del.), 74 Atl. 4; *Daniel v. State*, 103 Ga. 202, 29 S. E. 767; *Pound v. State*, 43 Ga. 88; *Kipley v. People*, 215 Ill. 358, 74 N. E. 379; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *State v. Collins*, 32 Iowa, 36; *State v. Spendlove*, 44 Kan. 1, 24 Pac. 67; *Commonwealth v. West* (Ky.), 113 S. W. 76; *Commonwealth v. Hoskins* (Ky.), 35 S. W. 284; *Riley v. Commonwealth*, 15 Ky. Law Rep. 46, 22 S. W. 222; *Payne v. Commonwealth*, 1 Met. (Ky.), 370; *State v. Coleman*, 119 La. 669, 44 South. 338; *Commonwealth v. Tircinski*, 189 Mass. 257, 4 Ann. Cas. 337, 2 L. R. A., N. S., 102, 75 N. E. 261; *Chase v. State*, 46 Miss. 683; *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62; *Jolly v. State*, 21 Miss. 223; *State v. Zorn*, 202 Mo. 12, 100 S. W. 591; *State v. Brown*, 63 Mo. 439; *State v.*

was the aggressor, and the justification of the accused's behavior at the time.⁹¹ There are, as we have stated, some few decisions to the contrary but they are overwhelmed by the weight of those cited. Evidence of the character and habits of the party slain is proper only so far as they can be supposed to have affected the intention of the slayer in the fatal act; and therefore his general bad character is inadmissible. The evidence should be confined to a character and habits of violence or treachery, such as might beget reasonable apprehensions of grievous bodily harm, and reduce the other party to the apparent necessity to slay in self-preservation.⁹² Such testimony is competent where it is relevant either because of prior evidence received in the case, or where the prisoner has laid the proper foundation for its reception by proof of facts making it relevant, and where it reasonably appears that the prisoner knew, or may be supposed to have known, such char-

Hanlon, 38 Mont. 557, 100 Pac. 1035; State v. Shafer, 22 Mont. 17, 55 Pac. 526; People v. Rodawald, 177 N. Y. 408, 70 N. E. 1; People v. Druse, 103 N. Y. 655, 8 N. E. 733; State v. McIver, 125 N. C. 645, 34 S. E. 439; State v. Matthews, 78 N. C. 523; State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; State v. Floyd, 51 N. C. 392; State v. Barfield, 30 N. C. 344; State v. Tackett, 8 N. C. 210; State v. Roderick, 77 Ohio St. 301, 82 N. E. 1082; Upthegrove v. State, 37 Ohio St. 662; State v. Thompson, 49 Or. 46, 124 Am. St. Rep. 1015, 88 Pac. 583; Commonwealth v. Straesser, 153 Pa. 451, 26 Atl. 17; Commonwealth v. Flanigan, 8 Phila. (Pa.) 430; State v. Stukes, 73 S. C. 386, 53 S. E. 643; State v. Smith, 12 Rich. (S. C.) 430; Rippy v. State, 39 Tenn. 217; Cope-land v. State, 7 Humph. (Tenn.) 479; Carroll v. State, 3 Humph. (Tenn.) 315; Spencer v. State (Tex. Cr.), 128 S. W. 118; Venters v. State, 47 Tex. Cr. 280, 83 S. W. 832; Crow v. State,

48 Tex. Cr. 419, 88 S. W. 814; Cole v. State, 48 Tex. Cr. 439, 88 S. W. 341; State v. Morrison, 49 W. Va. 210, 38 S. E. 481; Smith v. United States, 161 U. S. 85, 40 L. Ed. 626, 16 Sup. Ct. Rep. 483.

⁹¹ De Arman v. State, 71 Ala. 351; Palmore v. State, 29 Ark. 248; People v. Lombard, 17 Cal. 316; Williams v. Fambro, 30 Ga. 232; State v. Spendlove, 44 Kan. 1, 24 Pac. 67; Commonwealth v. Thomas, 31 Ky. Law Rep. 899, 104 S. W. 326; State v. Rideau, 116 La. 245, 40 South. 691; State v. Robinson, 52 La. Ann. 616, 27 South. 124; State v. Talmage, 107 Mo. 543, 17 S. W. 990; State v. Rider, 90 Mo. 54, 1 S. W. 825; State v. Dumphrey, 4 Minn. 438; State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; State v. Thompson, 49 Or. 46, 124 Am. St. Rep. 1015, 88 Pac. 583; State v. Cushing, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145.

⁹² State v. Smith, 12 Rich. (S. C.) 430.

acter or conduct; for if he was ignorant of them they could not possibly have modified his intention in the act of slaying.⁹³

§ 157 (155). Character—Actions for malicious prosecution.—In actions for malicious prosecution, to entitle a plaintiff to prevail he must, in the first instance, establish by his proofs a want of probable cause for commencing the prosecution complained about. Such is an elementary principle in actions of this character and cannot be dispensed with. From a want of probable cause malice may be inferred. But proof of malice without proof of want of probable cause is insufficient to warrant a recovery. Or, in other words, want of probable cause is not inferable from malice, notwithstanding the converse of this proposition is the law.⁹⁴ As a general proposition in cases of this nature, as part of the *res gestae*, defendant ought to be allowed to prove all the circumstances out of which the prosecution arose and the various steps taken before the warrant of arrest was issued. He might prove his own good character as an element to ward off any suspicion that he might have acted without probable cause.⁹⁵ As

⁹³ Tribble v. State, 145 Ala. 23, 40 South. 938; Fields v. State, 47 Ala. 603, 11 Am. Rep. 771; Williams v. State, 74 Ala. 18; Martin v. State, 90 Ala. 602, 24 Am. St. Rep. 844, 8 South. 858; Copeland v. State, 41 Fla. 320, 26 South. 319; Davis v. People, 114 Ill. 86, 29 N. E. 192; Bowlus v. State, 130 Ind. 227, 28 N. E. 1115; Boyle v. State, 97 Ind. 322; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; Hargis v. Commonwealth, 135 Ky. 578, 123 S. W. 239; Commonwealth v. Bright, 23 Ky. Law Rep. 1921, 66 S. W. 604; Commonwealth v. Hoskins, 18 Ky. Law Rep. 59, 35 S. W. 284; State v. Thompson, 109 La. 296, 33 South. 320; Brownell v. People, 38 Mich. 732; Spivey v. State, 58 Miss. 858; Chase v. State, 46 Miss.

683; State v. Talmage, 107 Mo. 543, 17 S. W. 990; State v. Bryant, 55 Mo. 75; State v. Sumner, 130 N. C. 718, 41 S. E. 803; State v. Turner, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891; Serna v. State (Tex. Cr.), 105 S. W. 795; Crow v. State, 48 Tex. Cr. 419, 88 S. W. 814; Plasters v. State, 1 Tex. App. 673; State v. Lull, 48 Vt. 581; Smith v. United States, 161 U. S. 85, 40 L. Ed. 626, 16 Sup. Ct. Rep. 483.

⁹⁴ Banker v. Ford, 152 Ill. App. 12.

⁹⁵ McLeod v. McLeod, 75 Ala. 483; Brown v. Selfridge, 34 App. D. C. 242; Coleman v. Heurich, 2 Mackey (D. C.), 189; Banker v. Ford, *supra*; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93; Skid-

bearing on both of these questions and also in mitigation of damages, he may show the general bad reputation of the plaintiff as known to him when he launched the prosecution.⁹⁶ And although the *prevalence of reports* that the plaintiff in the action for malicious prosecution had committed the offense charged would not alone justify a proceeding against him, yet the existence of such reports in the community, representations of others made even without proper grounds, communications from one to another to be given to the defendant, and the fact that they were known and believed by the defendant, may be shown as

more v. Bricker, 77 Ill. 164; Israel v. Brooks, 23 Ill. 526 (575); Blizard v. Hays, 46 Ind. 166, 15 Am. Rep. 291; Holden v. Meritt, 92 Iowa, 707, 61 N. W. 390; Gregory v. Thomas, 2 Bibb (Ky.), 286, 5 Am. Dec. 608; Pullen v. Glidden, 68 Me. 559; McIntire v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594, 2 L. R. A. 517, 20 N. E. 191; Bacon v. Towne, 4 Cush. (Mass.) 217, 241; Thurkettle v. Frost, 137 Mich. 115, 4 Ann. Cas. 836, 100 N. W. 283; Patterson v. Garlock, 39 Mich. 447; Shea v. Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552; Carp v. Queen Ins. Co., 203 Mo. 295, 101 S. W. 78; Gregory v. Chambers, 78 Mo. 294; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Miller Bank v. Richmon, 64 Neb. 111, 89 N. W. 627; Scott v. Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016; Bostick v. Rutherford, 4 Hawks (N. C.), 83; Miles v. Salisbury, 21 Ohio C. C. 333, 12 Ohio Cir. Dec. 7; Funk v. Amor, 7 Ohio C. C. 419, 4 Ohio Cir. Dec. 662; Glace v. Hummel, 10 Pa. Dist. 110, 24 Pa. Co. Ct. 550, 4 Dauph. Co. Rep. 1; Driggs v. Burton, 44 Vt. 124; Barron v. Mason, 31 Vt. 189; Southern R. Co. v. Mosby (Va.), 70 S. E. 517; Woodworth v. Mills, 61 Wis. 44, 50 Am.

Rep. 135, 20 N. W. 728; Rodriguez v. Tadmire, 2 Esp. 721. It is generally held, however, in civil actions that the plaintiff cannot introduce such evidence until his character has been attacked by the defendant: Snead v. Jones, 169 Ala. 143, 53 South. 188; Bell v. State, 124 Ala. 94, 27 South. 414; McIntire v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594, 2 L. R. A. 517, 20 N. E. 191; San Antonio etc. R. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Carroll v. New Jersey Cent. R. Co., 134 Fed. 684.

⁹⁶ Martin v. Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Sherwood v. Reed, 35 Conn. 450, 95 Am. Dec. 284; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93; Israel v. Brooks, 23 Ill. 526, 575; Bruce v. Tyler, 127 Ind. 468, 26 N. E. 1081; Walker v. Pittman, 108 Ind. 341, 9 N. E. 175; Lockwood v. Beard, 4 Ind. App. 505, 30 N. E. 15; Pullen v. Glidden, 68 Me. 559, 563; Eschbach v. Hurtt, 47 Md. 61; Gregory v. Chambers, 78 Mo. 294; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Bacon v. Towne, 4 Cush. (Mass.) 217, 240; Gee v. Culver, 13 Or. 598, 11 Pac. 302; Barron v. Mason, 31 Vt. 189; Vinal v. Core, 18 W. Va. 1.

tending to prove his prudence and good faith.⁹⁷ But on obvious grounds the defendant cannot in such cases prove *other specific offenses* on the part of the plaintiff.⁹⁸ There is high authority for the view that in actions for malicious prosecution of a *criminal action* the plaintiff may in the first instance prove his own good character. This is an exception to the general rule that in civil cases proof of good character cannot be received until it is attacked; and such testimony is deemed relevant in such cases as bearing directly on the issue of probable cause. In a Massachusetts case,⁹⁹ the court said: "One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis*, he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for a malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution he would have had the right to show his good reputation, although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character necessarily appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation known to the defendant when the prosecution was commenced. In several of the states there are adjudications to this effect."¹⁰⁰

⁹⁷ *Lamb v. Galland*, 44 Cal. 609; *Pullen v. Glidden*, 68 Me. 559; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575; *Barron v. Mason*, 31 Vt. 189.

⁹⁸ *Killebrew v. Carlisle*, 97 Ala. 535, 12 South. 167; *Riley v. Gourley*, 9 Conn. 154; *Mitchinson v. Cross*, 58 Ill. 366; *Gregory v. Thomas*, 2 Bibb (Ky.), 286, 5 Am. Dec. 608; *Bullock v. Lindsay*, 9 Gray (Mass.), 30; *Til- lotson v. Warner*, 3 Gray (Mass.),

574; *Carson v. Edgeworth*, 43 Mich. 241, 5 N. W. 282; *Stevens v. Metropolitan L. Ins. Co.*, 2 Misc. Rep. 584, 21 N. Y. Supp. 1024; *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414.

⁹⁹ *McIntire v. Levering*, 148 Mass. 546, 12 Am. St. Rep. 594, 2 L. R. A. 517, 20 N. E. 191.

¹⁰⁰ *Snead v. Jones*, 169 Ala. 143, 53 South. 188; *Long v. Rogers*, 17 Ala. 540; *Lamb v. Galland*, 44 Cal. 609; *Anderson v. Friend*, 71 Ill. 475; *Israel v. Brooks*, 23 Ill. 526, 575;

§ 158 (156). **Proof of good character.**—It is apparent, from the preceding sections and the statement of the law therein, that in civil actions it is ordinarily irrelevant to show the good character of either party. Such evidence is, in general, confined to criminal prosecutions involving the question of moral turpitude. But where a civil action is brought for an injury to property, though the injury was legally criminal and involved moral turpitude, in so much that, on an indictment, character would be obviously receivable, there is no authoritative case now existing which favors its admissibility. The law stands as when Daggett, J., said:¹ “Causes charging cruelty, gross fraud and even forgery, are often agitated in suits by individuals; and the result not infrequently affects the property and reputation of the party deeply; yet no individual has been permitted to attempt to repel the proof by showing a good reputation.”² In most of the cases where the proof of the bad character of the plaintiff is allowed, it is only in mitigation of damages. There is no such ground for admitting testimony of good character. It has indeed been sometimes held that when the *character is attacked by*

Pennsylvania Co. v. Weddle, 100 Ind. 138; Blizzard v. Hays, 46 Ind. 166, 15 Am. Rep. 261; Ammerman v. Crosby, 26 Ind. 451; Anderson v. Columbia Finance etc. Co., 20 Ky. Law Rep. 1790, 50 S. W. 40; McIntire v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594, 2 L. R. A. 517, 20 N. E. 191; Bacon v. Towne, 4 Cush. (Mass.) 217; Lindsay v. Bates, 223 Mo. 294, 122 S. W. 682; Miller v. Brown, 3 Mo. 127; Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800; Brown v. Smallwood, 86 N. Y. App. Div. 76, 83 N. Y. Supp. 415, 13 N. Y. Ann. Cas. 308; English v. Major, 59 Hun, 317, 12 N. Y. Supp. 935; Tucker v. Wilkins, 105 N. C. 272, 11 S. E. 575; Britton v. Granger, 13 Ohio C. C. 281, 7 Ohio Cir. Dec. 182;

Scott v. Fletcher, 1 Over. (Tenn.) 488; Gimbel v. Gomprecht (Tex. Civ. App. 1896), 36 S. W. 781; French v. Smith, 4 Vt. 363, 24 Am. Dec. 616; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; Bernard v. Coutellier, 45 U. C. Q. B. 453.

¹ In *Humphrey v. Humphrey*, 7 Conn. 116.

² The *Attorney General v. Bowman*, 2 Bos. & P. 532; note a, is the leading English case. It settles the distinction, and has uniformly been followed at Westminster Hall. That case is adopted, and *Ruan v. Perry*, 3 Caines (N. Y.), 120, virtually overruled, in *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 675, 16 Am. Dec. 460.

cross-examination, imputing misconduct or by proof of specific acts of misconduct, his good character becomes involved, and may be shown as part of the main case or defense.³ The doctrine has even been maintained that in actions for *slander and libel* the plaintiff's character is put in issue by the very nature of the proceeding; that the plaintiff need not await the movements of the defendant, but may, in the first instance, prove his good character, whether it is attacked or not;⁴ but by the weight of authority and the better reasoning, such evidence should not be received unless the reputation has been attacked by general evidence of bad character in those actions where character is in issue. The law presumes the character of a party to be good until the contrary is shown and he can

³ *Bennett v. Hyde*, 6 Conn. 24; *Sheehy v. Cokley*, 43 Iowa, 183, 22 Am. Rep. 236; *Williams v. Greenwade*, 3 Dana (Ky.), 432; *Sample v. Wynn*, Busb. (44 N. C.) 319; *Williams v. Haig*, 3 Rich. (S. C.) 362, 45 Am. Dec. 774; *Adams v. Lawson*, 17 Gratt. (Va.) 250, 94 Am. Dec. 455, and note; *Shroyer v. Miller*, 3 W. Va. 158; *King v. Waring*, 5 Esp. 13; *Rogers v. Clifton*, 3 Bos. & P. 583; *Burton v. March*, 6 Jones (N. C.), 409. Evidence of a party's good character is inadmissible in civil actions where such character is not directly in issue: *Fahey v. Crotty*, 63 Mich. 383, 6 Am. St. Rep. 305, 29 N. W. 876, and note; *Anthony v. Stephens*, 1 Mo. 254, 13 Am. Dec. 497, and note. Evidence in a slander case of plaintiff's good character is inadmissible, as a general rule, until there has been an attempt by evidence to impeach it: *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477; *Rhodes v. Ijames*, 7 Ala. 574, 42 Am. Dec. 604; but it has been held in a South Carolina case that the general good character of the plaintiff, in an ac-

tion for slander, could be admitted in evidence, even though not called in question by the defendant; *Williams v. Haig*, 3 Rich. (S. C.) 362, 45 Am. Dec. 774. See note to *O'Bryan v. O'Bryan*, 13 Mo. 16, 53 Am. Dec. 128, 133, as to the admissibility of evidence of character generally. See, also, note to *Hitchcock v. Moore*, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914. As to good character in malicious prosecution, see last section.

⁴ *Rhodes v. Ijames*, 7 Ala. 574, 42 Am. Dec. 604; *Burnett v. Simpkins*, 24 Ill. 264; *Larned v. Buffington*, 3 Mass. 546, 3 Am. Dec. 185; *Stone v. Varney*, 7 Met. (Mass.) 86, 39 Am. Dec. 762, and note; *Anthony v. Stephens*, 1 Mo. 254, 13 Am. Dec. 499; *Williams v. Haig*, 3 Rich. (S. C.) 362, 45 Am. Dec. 774, and note. See note to *Adams v. Lawson*, 17 Gratt. (Va.) 250, 94 Am. Dec. 455, and note; *Shroyer v. Miller*, 3 W. Va. 158, 161; *Houghtaling v. Kilderhouse*, 1 N. Y. 530; *Earl of Leicester v. Walter*, 2 Camp. 251. See § 149, *ante*, and cases cited.

safely rest on that presumption.⁵ We cannot close this section without giving the signification of the terms we have so often used herein,—character and reputation. Character is the combination of qualities distinguishing any person, the individuality which is the product of nature, habits, and environment. Reputation is the estimation in which a person is held by others; especially the popular opinion, whether favorable or the reverse.⁶ Although, as we have said, the words are to a certain extent used as synonymous in legal acceptance, the difference is well marked. “Character lives in a man, reputation *outside* of him.”⁷ “Character is like an inward and spiritual grace of which *reputation* is, or should be, the outward and visible sign.”⁸ A graphic definition of reputation, which was there called general character, was given by Erskine. He described it as the “slow-spreading influence of opinion arising from the deportment of a man in society. As a man’s deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence.”⁹ If the presumption of good character is based on the *mens conscia recti*, there is little dan-

⁵ Stow v. Converse, 3 Conn. 325, 8 Am. Dec. 189; Miles v. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Lamagdelaine v. Tremblay, 162 Mass. 339, 39 N. E. 38; Howland v. Blake Co., 156 Mass. 543, 31 N. E. 656; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, and cases there cited in the decision and in the note, 37 N. W. 914; Houghtaling v. Kilderhouse, 2 Barb. (N. Y.) 149; 1 N. Y. 530; Gough v. St. John, 16 Wend. (N. Y.) 646; Matthews v. Huntley, 9 N. H. 146; Anderson v. Long, 10 Serg. & R. (Pa.) 55; Poler v. Poler, 32 Wash. 400, 73 Pac. 372; Cornwall v. Richardson, Ryan & M. 305.

⁶ Standard Dictionary.

⁷ Holland, Gold Foil, c. 19, p. 219.

⁸ R. G. White, Words and Their Uses, c. 5, p. 99. A man’s character may be unknown and his reputation may be good or bad. He may have a good character and a bad reputation or a bad character and a good reputation. He may be

“A man

Who stole the livery of the court of Heaven

To serve the devil in”—

—Pollock, *The Course of Time*, Book 8, 616.

And Shakespeare gives it to us,

“The devil hath power

To assume a pleasing shape.”

—Hamlet, Act 2, Scene 2.

⁹ State v. Laxton, 76 N. C. 216.

ger to be apprehended; if it is not, and its unstable foundation is nevertheless unknown, the danger of attack is not materially increased; but, if the man's character is bad and his reputation is bad, then he comes into court at his peril and must be prepared for the consequential attack upon it which he should have reason to expect, and which perhaps in the interests of the community—if not of justice—is better made at such an opportune time.

§ 159 (157). Proof of financial standing of defendant—Exemplary damages—Compensatory damages.—It comes rather as a shock to the lay mind that there is one law for the rich and another for the poor, although in the administration of justice, the process of the dealing out is for the better of the community. The logic of the position is unassailable, and may be easily analyzed. We have seen that in exceptional cases character becomes relevant in civil actions; and that generally, when admitted, such evidence is received to affect the measure of damages. This stage marks one law for the man of good repute and another for him who is said to live evilly. Under ordinary circumstances the financial situation and standing of the parties are wholly irrelevant. The amount of damages depends upon the terms of the contract, or, in an action of tort upon other circumstances wholly independent of the wealth or poverty of the parties;¹⁰ but it is well settled that there is a class of cases in which the wealth of the defendant becomes a material fact, which may be proved on the question of the amount of damages. For example, in those cases where *exemplary* or *punitive* damages are allowed, this testimony becomes relevant on the ground that a verdict, which might sufficiently punish one of limited means, would seem insignificant to a defendant having a large for-

¹⁰ *Myers v. Maleom*, 6 Hill (N. Y.), N. E. 944; *Marshall v. Mitchell*, 59 292, 41 Am. Dec. 744, and note; S. C. 523, 38 S. E. 158; *Harris v. Kniffen v. McConnell*, 30 N. Y. 285; *Tyson*, 24 Pa. 347, 64 Am. Dec. 662-668.
Hutchins v. Hutchins, 98 N. Y. 56;
Brown v. Klock, 117 N. Y. 340, 22

tune.¹¹ Evidence of the wealth or standing of the defendant is sometimes relevant for the purpose of determining *compensatory* damages. This is for the reason that the financial standing of the defendant is one of the elements contributing to his influence in his social environment; and there are injuries which are aggravated or increased by the fact that the persons responsible for them are persons of rank or influence. "So far as the cause of action rests upon an injury to the character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from wrongful acts the greater."¹² Evidence of the pecuniary circumstances of the defendant is admissible in two classes of cases: 1. Where the case is one in which exemplary damages may be awarded; 2. Where the case is of such a nature that the wealth of the defendant increases the wrong inflicted. And a third class might perhaps be made in actions for breach of promise of marriage, where the wealth of the defendant is admissible to show the extent of the plaintiff's loss; though this class may properly fall under the second of the above classes. Exemplary damages are given as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or where the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, and in such cases the coloring facts are always relevant.¹³ Exemplary

¹¹ See the cases cited below. But a different rule prevails in Iowa: *Hunt v. Chicago & N. W. Ry. Co.*, 26 Iowa, 364; *Guengerech v. Smith*, 34 Iowa, 348. To the point that the defendant can offer proof on the same subject, though the plaintiff does not, see *Johnson v. Smith*, 64 Me. 553. But where there are several defendants and a verdict of a lump sum

against all is to be rendered, evidence of the wealth of one is not admissible: *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543, 19 Sup. Ct. Rep. 296.

¹² *Johnson v. Smith*, 64 Me. 553, 555.

¹³ *Snedecor v. Pope*, 143 Ala. 275, 39 South. 318; *Southern R. Co. v. Bunt*, 131 Ala. 591, 32 South. 507;

damages are very generally awarded at the present day in cases of malicious and wanton torts, and the like. And in such cases as these, since part of the damages is avowedly awarded for the purpose of punishing the defendant, if he is a man of large means and great pecuniary resources, he will not be punished adequately by a money verdict which would be fully sufficient for this purpose when rendered against a defendant of little means. An amount that

Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303; St. Louis & S. F. R. Co. v. Brown, 62 Ark. 254, 35 S. W. 225; Barlow v. Lowder, 35 Ark. 492; Lowe v. Yolo County etc. Water Co., 157 Cal. 503, 108 Pac. 297; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142; Wall v. Cameron, 6 Colo. 275; Murphy v. Hobbs, 7 Colo. 541, 553, 49 Am. Rep. 366, 5 Pac. 119; Welch v. Durand, 36 Conn. 184, 4 Am. Rep. 55; Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Farrow v. Hoffecker, 7 Penne. (Del.) 223, 79 Atl. 920; Watson v. Hastings, 1 Penne. (Del.) 47, 39 Atl. 587; Central R. Co. v. Augusta Brokerage Co., 122 Ga. 646, 69 L. R. A. 119, 50 S. E. 473; Georgia R. & Bkg. Co. v. Eskew, 86 Ga. 641, 22 Am. St. Rep. 490, 12 S. E. 1061; Louisville & N. R. Co. v. Forrest, 6 Ga. App. 766, 65 S. E. 808; Jacobus v. Congregation etc., 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; Coffin v. Spencer, 2 Haw. 23; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Harrison v. Ely, 120 Ill. 83, 11 N. E. 334; Fidelity etc. Co. v. Gibson, 135 Ill. App. 290; Moore v. Crose, 43 Ind. 30; Millison v. Hoch, 17 Ind. 227; Casey v. Ballou Banking Co., 98 Iowa, 107, 67 N. W. 98; Martin v. Murphy, 85 Iowa, 669, 52

N. W. 662; Martin v. Garlock, 82 Kan. 266, 20 Ann. Cas. 84, 108 Pac. 92; Cady v. Case, 45 Kan. 733, 26 Pac. 448; Kansas City etc. R. Co. v. Kier, 41 Kan. 661, 671, 13 Am. St. Rep. 311, 21 Pac. 770; Louisville etc. R. Co. v. Eaden, 122 Ky. 818, 29 Ky. Law Rep. 365, 6 L. R. A., N. S., 581, 93 S. W. 7; Illinois etc. R. Co. v. Lence, 30 Ky. Law Rep. 988, 100 S. W. 215; Louisville & N. R. Co. v. Miller, 134 Ky. 716, 135 Am. St. Rep. 433, 121 S. W. 648; Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406; Webb v. Rothschild, 49 La. Ann. 244, 21 South. 258; Graham v. St. Charles etc. R. Co., 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 South. 707; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Johnson v. Smith, 64 Me. 553; Philadelphia etc. R. Co. v. Green, 110 Md. 32, 71 Atl. 986; Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 16 L. R. A., N. S., 746, 69 Atl. 405; Thillman v. Neal, 88 Md. 525, 42 Atl. 242; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; McChesney v. Wilson, 132 Mich. 252, 1 Ann. Cas. 191, 93 N. W. 627; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. 843; Illinois etc. R. Co. v. Dodds, 97 Miss. 865, 53 South. 409; Lochte v. Mitchell (Miss. 1900), 28 South.

might be extremely punitive to a defendant of small or moderate means would be light and trivial to a wealthy defendant. Therefore, in such cases and upon this ground, the pecuniary circumstances of the defendant become material and relevant, and may be considered by the jury in determining the amount of their verdict.¹⁴ The rule that in cases of malicious and wanton torts, where exemplary damages may be awarded, evidence of the defendant's

877; *Reese v. Barbee*, 61 Miss. 181; *Summers v. Keller*, 152 Mo. App. 626, 133 S. W. 1180; *Baxter v. Magill*, 127 Mo. App. 392, 105 S. W. 679; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W. 209; *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100; *Kimball v. Holmes*, 60 N. H. 163; *Trainer v. Wolff*, 58 N. J. L. 381, 33 Atl. 1051; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Connors v. Walsh*, 131 N. Y. 590, 30 N. E. 59; *Lawyer v. Fritcher*, 130 N. Y. 239, 27 Am. Rep. 521, 14 L. R. A. 700, 29 N. E. 267; *Voltz v. Blackmar*, 64 N. Y. 440; *White v. Barnes*, 112 N. C. 323, 16 S. E. 922; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Roberts v. Mason*, 10 Ohio St. 277; *Hamerlynck v. Banfield*, 36 Or. 436, 59 Pac. 712; *McDevitt v. Vial* (Pa. 1887), 11 Atl. 645; *Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574; *Douty v. Bird*, 60 Pa. 48; *Adams v. Manufacturing Co.*, 29 R. I. 333, 71 Atl. 180; *Gwynn v. Tel. Co.*, 69 S. C. 434, 104 Am. St. Rep. 819, 67 L. R. A. 111, 48 S. E. 460; *Brasington v. South Bound R. Co.*, 62 S. C. 325, 89 Am. St. Rep. 905, 40 S. E. 665; *Baxter v. Campbell*, 17 S. D. 475, 97 N. W. 386; *Byram v. McGuire*, 3 Head (Tenn.), 580; *Wilkins v. Gilmore*, 2 Humph. (Tenn.) 140; *Temple v. Duran* (Tex. Civ.), 121 S. W. 253;

Williams v. Detroit Oil Co., 52 Tex. Civ. App. 243, 114 S. W. 167; *Gold v. Campbell*, 54 Tex. Civ. App. 269, 117 S. W. 463; *Moore v. Duke* (Vt.), 80 Atl. 194; *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Lamb v. Stone*, 95 Wis. 254, 70 N. W. 72; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342; *Leavitt v. Cutler*, 37 Wis. 46; *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632, 17 Sup. Ct. Rep. 265; *The Amiable Nancy*, 3 Wheat. (U. S.) 546, 4 L. Ed. 456; *Falardeau v. Couture*, 2 L. C. Jur. 96; *Carsley v. Bradstreet Co.*, 29 L. C. Jur. 330, 2 Mont. Super. Ct. 33; *Forde v. Skinner*, 4 Car. & P. 239, 19 Eng. Crim. L. 494; *Emblen v. Myers*, 6 Hurl. & N. 54, 30 L. J. Exch. 71, 2 L. T., N. S., 774, 8 Wkly. Rep. 665; *Gallagher v. Westmoreland*, 31 N. Brunsw. (Can.) 194.

¹⁴ *Sloan v. Edwards*, 61 Md. 89; *McCarthy v. Niskern*, 22 Minn. 90; *Belknap v. Boston & M. R. R.*, 49 N. H. 358; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Brown v. Evans*, 17 Fed. 912, 8 Saw. 488.

pecuniary circumstances is admissible must be considered as settled in view of the numerous authorities. It is thus stated by Hosmer, C. J.: "Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence."¹⁵ In a Maine case,¹⁶ it is said: "So far as the cause of action rests upon an injury to the character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater." It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been

¹⁵ *Bennett v. Hyde*, 6 Conn. 27.

¹⁶ *Johnson v. Smith*, 64 Me. 555.

entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit."¹⁷

§ 160 (158). Same, continued.—On this ground proof of the financial standing of the defendant has been received in actions for slander and libel¹⁸ (although there is a qualifi-

¹⁷ *Day v. Woodward*, 13 How. (U. S.) 371, 14 L. Ed. 181. See, also, *Lake Shore etc. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97, 13 Sup. Ct. Rep. 261; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632, 17 Sup. Ct. Rep. 265; *Woldson v. Larson*, 164 Fed. 548, 90 C. C. A. 422.

¹⁸ *Childers v. Mercury Print. & Pub. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; *Hotchkiss v. Porter*, 30 Conn. 414; *Bennett v. Hyde*, 6 Conn. 24; *Todd v. Every Evening Printing Co.*, 6 Penne. (Del.) 233, 66 Atl. 97; *Donahoe v. Star Pub. Co.*, 4 Penne. (Del.) 166, 55 Atl. 337; *Russell v. Washington Post Co.*, 31 App. D. C. 277; *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *Fowler v. Wallace*, 131 Ind. 347, 31 N. E. 53; *Thompson v. Rake*, 140 Iowa, 232, 18 L. R. A., N. S., 921, 118 N. W. 279; *Blocker v. Schoff*, 83 Iowa,

265, 48 N. W. 1079; *Walker v. Wickens*, 49 Kan. 42, 30 Pac. 181; *Stanwood v. Whitmore*, 63 Me. 209; *Humphries v. Parker*, 52 Me. 507; *Larned v. Buffington*, 3 Mass. 546, 3 Am. Dec. 185; *Shute v. Barrett*, 7 Pick. (Mass.) 82; *Botsford v. Chase*, 108 Mich. 432, 66 N. W. 325; *Randall v. Evening News Assn.*, 97 Mich. 136, 56 N. W. 361; *Brown v. Globe Printing Co.*, 213 Mo. 611, 127 Am. St. Rep. 627, 112 S. W. 462; *Brown v. Publishers*, 213 Mo. 655, 112 S. W. 474; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; *Wagner v. Saline Co. Progress Print. Co.*, 45 Mo. App. 6; *Nelson v. Wallace*, 48 Mo. App. 193; *Butler v. Gazette Co.*, 119 App. Div. 767, 104 N. Y. Supp. 637; *Burkhardt v. Press Pub. Co.*, 130 App. Div. 22, 114 N. Y. Supp. 451; *Saunders v. Post-Standard Co.*, 107 App. Div. 84, 94 N. Y. Supp. 993; *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722; *Gressman v. Morning Journal*

cation in one or two of the cases, which does not, however, affect the weight of authority),¹⁹ assault and battery,²⁰

Assn., 197 N. Y. 474, 90 N. E. 1131; Amory v. Vreeland, 125 App. Div. 850, 110 N. Y. Supp. 859; Reeves v. Winn, 97 N. C. 246, 2 Am. St. Rep. 287, 1 S. E. 448; Adecock v. Marsh, 30 N. C. 360; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; McAlmont v. McClelland, 14 Serg. & R. (Pa.) 362; Burckhalter v. Coward, 16 S. C. 435; Young v. Kuhn, 71 Tex. 645, 9 S. W. 860; Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322; Harman v. Cundiff, 82 Va. 239; Delaney v. Kaetel, 81 Wis. 353, 51 N. W. 559; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518. Evidence should not be offered to increase the damages until some testimony has been submitted tending to prove the matter charged: Winter v. Donovan, 8 Gill (Md.), 370. When a plaintiff voluntarily joins several parties as defendants, he must be held thereby to waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined: Washington Gaslight Co. v. Lansden, 172 U. S. 534, 43 L. Ed. 543, 19 Sup. Ct. Rep. 296. There are a few cases in which the evidence has been held inadmissible: Guengerech v. Smith, 34 Iowa, 348 (with a strong and correct dissenting opinion by Beck, C. J.); Young v. Kuhn, 71 Tex. 645, 9 S. W. 860 (though Stayton, C. J., said that it might be true that the larger number of adjudicated cases held otherwise). Such evidence is inadmissible as against a corporation: Randall v. Evening News Assn., 97 Mich. 136, 56 N. W. 361.

¹⁹ In *Palmer v. Haskins*, 28 Barb. (N. Y.) 90, it was said that the general standing of the defendant in society might be shown, but the decision seems to be that the wealth of the defendant cannot be shown for the purpose of having the jury infer the social position from this alone. See, also, *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 492.

²⁰ *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875; *Schmitt v. Kurrus*, 140 Ill. App. 132; *Lister v. McKee*, 79 Ill. App. 210; *Jones v. Jones*, 71 Ill. 562; *Cochran v. Ammon*, 16 Ill. 315; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Gore v. Chadwick*, 6 Dana (36 Ky.), 477; *Johnson v. Smith*, 64 Me. 553; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Stockham v. Malcolm*, 111 Md. 615, 19 Ann. Cas. 759, 74 Atl. 569; *Gaither v. Blowers*, 11 Md. 536; *Sloan v. Edwards*, 61 Md. 89; *Bell v. Morrison*, 27 Miss. 68; *Eltringham v. Earhart*, 67 Miss. 488, 19 Am. St. Rep. 319, 7 South. 346; *Baxter v. Magill*, 127 Mo. App. 392, 105 S. W. 679; *Dailey v. Houston*, 58 Mo. 361; *Pendleton v. Davis*, 1 Jones (N. C.), 98; *Hendricks v. Fowler*, 16 Ohio C. C. 597; *Willet v. Johnson*, 13 Okl. 563, 76 Pac. 174; *Jacoby v. Gufer*, 6 Serg. & R. (Pa.) 399; *Rowe v. Moses*, 9 Rich. (S. C.) 423, 67 Am. Dec. 560, and note; *Harris v. Marco*, 16 S. C. 575; *Thomas v. Williams*, 139 Wis. 467, 121 N. W. 148; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Brown v. Evans*, 17 Fed. 912, 8 Saw. (U. S.) 488; *Roach v. Caldbeck*, 64 Vt.

malicious prosecution²¹ and seduction.²² And notwithstanding a contrary practice in England, in actions of

593, 24 Atl. 989. In an action against an innkeeper, who, after a guest had engaged and paid for a night's lodging, refused to let him have it, and turned him out of the house with abusive and insulting language, exemplary damages were recoverable and the pecuniary circumstances of the defendant were admissible: *McCarthy v. Niskern*, 22 Minn. 90. In some states exemplary damages are not recoverable in an action for assault and battery, on the ground that it is punishable criminally. And in such states as only compensatory damages may be given, the wealth of the defendant cannot be considered: *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96. In Iowa, though punitive damages may be awarded in assault and battery, the wealth of the defendant cannot be considered, the court deviating from the weight of authority: *Guengerech v. Smith*, 34 Iowa, 348, overruling *Karney v. Paisley*, 13 Iowa, 89, *Beck, C. J.*, dissenting. In Kentucky the law is that no evidence as to the financial condition of either party is admissible in any case in which punitive damages may be recovered: *Givens v. Berkley*, 108 Ky. 236, 56 S. W. 158; *Beavers v. Bowen* (Ky.), 70 S. W. 195.

²¹ *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 6 S. E. 204; *Falconbury v. Kendall*, 76 Ind. 260; *Sexton v. Hoover*, 1 Ind. App. 65, 27 N. E. 105; *Richardson v. Pierce*, 119 Mass. 165; *M. A. Seed Dry-Plate Co. v. Wunderlich*, 69 Minn. 288, 72 N. W. 122; *Abel v. Allemannia Bank*, 79 Minn. 419, 82 N. W. 680; *Peck v. Small*, 35 Minn. 465, 29 N. W. 69; *Whitfield v. Westbrook*, 40 Miss. 311; *Carp v. Queen Ins. Co.*, 203 Mo. 295,

101 S. W. 78; *Renfro v. Prior*, 22 Mo. App. 403; *Bump v. Betts*, 23 Wend. (N. Y.) 85; *Shenandoah M. E. Church v. Robbins*, *81 Pa. 361, 2 Wkly. Notes Cas. (Pa.) 592; *McBride v. McLaughlin*, 5 Watts (Pa.), 375; *Chase v. Bailey*, 49 Vt. 71; *Towne v. Rublee*, 51 Vt. 62; *Chittenden v. Woodbury*, 52 Vt. 562; *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320; *Winn v. Peckham*, 42 Wis. 493; *Jolly v. Wallis*, 3 Esp. 228.

²² *Robinson v. Burton*, 5 Harr. (Del.) 335; *Herring v. Jester*, 2 Houst. (Del.) 66; *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539, and note; *Grable v. Margrave*, 3 Scam. (Ill.) 372, 38 Am. Dec. 88; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806; *Wilson v. Shepler*, 86 Ind. 275; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; *McAulay v. Birkhead*, 13 Ired. (N. C.) 28, 55 Am. Dec. 427; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; *Lee v. Hodges*, 13 Gratt. (Va.) 726; *Riddle v. McGinnis*, 22 W. Va. 253; *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073; *Lavery v. Crooke*, 52 Wis. 612, 38 Ann. Rep. 768, 9 N. W. 599; *Klopfer v. Bromme*, 26 Wis. 372; *Salter v. Walker*, 21 L. T., N. S., 360, 18 Wkly. Rep. 65. The weight of authority is as stated above, although there are some cases in which the evidence has been excluded. In one especially, *Dain v. Wycoff*, 7 N. Y. 191, the court was most pronounced in asserting, on the authority of an English case (*James v. Bridlington*, 6 Car. & P. 589), that the amount of the defendant's property was not a question in the case. Later New York cases did not follow this one: See *Lipe v. Eiserlerd*, 32 N. Y. 229; *Ingersoll v.*

criminal conversation,²³ and in cases of negligence and trespass.²⁴ And in actions for *breach of promise of marriage*, the participation in the home and property of the defendant is among the 'things of which the plaintiff by the breach of contract is deprived; hence evidence of the defendant's financial standing is admissible as affording some standard by which to estimate the plaintiff's disappointment and the extent of the loss.'²⁵

Jones, 5 Barb. (N. Y.) 661; Damon v. Moore, 5 Lans. (N. Y.) 454. Other cases agreeing with *Dain v. Wycoff*, *supra*, are *West v. Druff*, 55 Iowa, 335, 7 N. W. 636; *Watson v. Watson*, 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605.

²³ *Robinson v. Burton*, 5 Harr. (Del.) 335; *Herring v. Jester*, 2 Houst. (Del.) 66; *Prettyman v. Williamson*, 1 Penne. (Del.) 224, 39 Atl. 731; *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593; *Browning v. Jones*, 52 Ill. App. 597; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539, and note; *Cochran v. Ammon*, 16 Ill. 316; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Mills v. Taylor*, 85 Mo. App. 111; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *McAulay v. Birkhead*, 35 N. C. 28, 55 Am. Dec. 427; *Matheis v. Mazet*, 164 Pa. 580, 30 Atl. 434; *Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; *Woldson v. Larson*, 164 Fed. 548, 90 C. C. A. 422. The English practice is opposed to the American in these cases: *James v. Bridlington*, 6 Car. & P. 589.

²⁴ *Jones v. Jones*, 71 Ill. 562; *Cumberland Tel. & T. Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6 (injury caused by a dog); *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206.

²⁵ Pecuniary circumstances of the defendant may be considered by the jury in estimating the damages in an action for breach of promise of marriage: Note to *Burnham v. Cornwell*, 63 Am. Dec. 546; *Collins v. Mack*, 31 Ark. 684; *Reed v. Clark*, 47 Cal. 194; *Douglas v. Gausman*, 68 Ill. 170; *Hunter v. Hatfield*, 68 Ind. 416; *McKenzie v. Gray*, 143 Iowa, 112, 120 N. W. 71; *McKee v. Mouser*, 131 Iowa, 203, 108 N. W. 228; *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; *Herriman v. Layman*, 118 Iowa, 590, 92 N. W. 710; *Beans v. Denny*, 141 Iowa, 52, 117 N. W. 1091; *Kennedy v. Rodgers*, 2 Kan. App. 764, 44 Pac. 47; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Spencer v. Simmons*, 160 Mich. 292, 19 Ann. Cas. 1126, 125 N. W. 9; *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8, and note; *Birum v. Johnson*, 87 Minn. 362, 92 N. W. 1; *Casey v. Gill*, 154 Mo. 181, 55 S. W. 219; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925; *Johansen v. Modahl*, 4 Neb. (Unof.) 411, 94 N. W. 532; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Chellis v. Chapman*, 125 N. Y. 214, 11 L. R. A. 784, 26 N. E. 308; *Kniffon v. McConnell*, 30 N. Y. 285; *Crosier v. Craig*, 47 Hun. (N. Y.), 83; *Smith v. Compton*, 67 N. J. L. 548, 58 L. R.

§ 161 (159). **Proof of financial standing of plaintiff.**—The same reasoning which ordinarily calls for the exclusion of the evidence of the defendant's financial condition applies with equal force to the plaintiff's and in those actions in which only compensatory damages are allowed, the financial standing of the plaintiff is irrelevant. For example, evidence cannot be received in an action for negligence against a railroad company that the plaintiff is of limited means, and that since the injury he has not been able to support his family. The evidence should be confined to the plaintiff and his capacity for business, and to the nature of his injuries and the probability of recovery. The damages in such cases are not at all dependent upon his condition as to wealth or poverty.²⁶ Such evidence is

A. 480, 52 Atl. 386; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Stribley v. Welz*, 8 Ohio C. C. 571; *Jarvis v. Johnson*, 2 Ohio Dec. 312, 2 West. L. Month. 389; *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581; *Hanson v. Johnson*, 141 Wis. 550, 124 N. W. 506; *Salchert v. Reinig*, 135 Wis. 194, 115 N. W. 132; *Olson v. Solveson*, 71 Wis. 663, 38 N. W. 329; *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726; *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. Rep. 921, 12 S. E. 698; *Humphrey v. Brown*, 89 Fed. 640; *Horam v. Humphreys*, Lofft, 80, 98 Eng. Reprint, 543; *James v. Bridgington*, 6 Car. & P. 589. In *Spencer v. Simmons*, *supra*, it was held that evidence of the wealth of the defendant's father was inadmissible. This following *Miller v. Rosier*, 31 Mich. 475, and *Aldis v. Stewart*, 4 Misc. Rep. 389, 24 N. Y. Supp. 329. In Ohio it is held admissible: *Stribley v. Welz*, 8 Ohio C. C. 571. The weight of authority is in favor of not confining the evidence to general rep-

utation of wealth: *Vierling v. Binder*, and other cases, *supra*. See extended review of the authorities in note to *Burnham v. Cornwell* (16 B. Mon. (Ky.) 284), 63 Am. Dec. 545-547.

²⁶ *Davis v. Kornman*, 141 Ala. 479, 37 South. 789; *Barbour County v. Horn*, 48 Ala. 566; *Malone v. Hawley*, 46 Cal. 409; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *Lake Shore & M. S. R. Co. v. Teeters* (Ind. App.), 74 N. E. 1014; *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727; *Parsons v. Lindsay*, 26 Kan. 426; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *Griser v. Schoenborn*, 109 Minn. 297, 123 N. W. 823; *Railroad Co. v. Hardy*, 88 Miss. 732, 41 South. 505; *Southern R. Co. v. McLellan*, 80 Miss. 700, 32 South. 283; *Baltimore etc. R. Co. v. Shipley*, 31 Md. 368; *Bolles v. Kansas City R. Co.*, 134 Mo. App. 696, 115 S. W. 459; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W. 209; *Schwanzer v. Brooklyn Heights R. Co.*, 18 App. Div. 205, 45 N. Y. Supp. 889; *Montgomery v. Seaboard etc. R. Co.*, 73 S. C. 503, 53 S. E. 987; *International etc. R. Co. v. Goswick*, 98

well calculated to unduly enhance the damages and to influence the jury to give damages beyond what is a compensation for the injury received. Defendant can in no case be required to support the family of one of their employees who may be injured even by the negligence of the servants of the company. Such a rule would be carrying the liability of such bodies beyond the liability of other persons, and would not accord with the analogies or principles of the law. And to permit such evidence would be virtually to impose that duty upon the defendant. The evidence must be confined, as we have above pointed out, to the plaintiff, his injuries, capacity for business and the probabilities of his recovery from the injuries received.²⁷ But in those actions where *exemplary* damages are awarded proof is allowed not only of the condition in life and of the circumstances of the defendant, but also of those of the plaintiff. Although in some of the decisions asserting this rule the expressions of opinion are *obiter* and

Tex. 477, 85 S. W. 785; Dreiss v. Friedrich, 57 Tex. 70; Missouri Pac. R. Co. v. Lyde, 57 Tex. 505; Dallas etc. R. Co. v. Summers, 48 Tex. Civ. App. 474, 106 S. W. 891; Lewis v. Crane, 78 Vt. 216, 62 Atl. 60; Vosburg v. Putney, 78 Wis. 84, 47 N. W. 99; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; National Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436. Where, however, the statute provides that damages shall inure to the family of deceased, it is competent to prove the number of his children: Felton v. Spiro, 78 Fed. 577, 24 C. C. A. 321. As to the admissibility on the question of damages for personal injuries of the amount paid for services of a substitute during incapacity, see the note to Stynes v. Boston Elevated Ry. Co., 30 L. R. A., N. S., 737.

²⁷ Pittsburg etc. Ry. Co. v. Powers, 74 Ill. 341; Dreiss v. Friedrich, 57 Tex. 70; Chicago v. O'Brennan, 65

Ill. 160. "In this character of case, where the suit is by the party himself for injuries received, although the plaintiff may show the nature of his business and the value of his services in conducting it, as a ground for estimating damages, yet his wealth or poverty is an immaterial issue, calculated to unduly influence the verdict, in regard to which evidence was not admissible; and the special exception should have been sustained": Missouri Pacific R. R. Co. v. Lyde, 57 Tex. 505. As has been well said, if the wealth of the plaintiff may be shown to increase damages, the correlative of the proposition should also be accepted, and the defendant allowed to mitigate his damage by showing his poverty: Field on Damages, § 120; Id., § 609, citing authorities in notes; Hunt v. Chicago etc. R. R. Co., 26 Iowa, 363; Guengerech v. Smith, 34 Iowa, 348; Barbour Co. v. Horn, 48 Ala. 566.

in others the reasons assigned are not very satisfactory, yet the doctrine is supported by much authority.²⁸ In an action for assault and battery, the pecuniary circumstances of the plaintiff and the dependent condition of his family may be given in evidence to increase the damages, especially where the case is one for exemplary damages.²⁹ And this evidence is also admissible on the ground that the poverty of the plaintiff makes the injury inflicted by the tort the greater. Thus where the husband and wife sued for an assault upon the wife, it was said that the pain and suffering may be much greater where from the husband's pecuniary condition he is unable to furnish medical aid, remedies, apartments, and nursing, such as ample means would afford, and therefore evidence of the pecuniary condition of the husband tended to show the extent of the injury.³⁰ The consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly upon his manual exertions for the support of himself and family, than to an individual differently situated in life.³¹ So evidence of the circumstances and financial standing and rank in life of the plaintiff has been allowed in actions of *libel and slander*;³² although the authorities are not at all in accord. From a perusal of them the weight seems decidedly in favor of the admission of the evidence. There seems to be no reason at all why the rules should vary, according to the particular tort, and from the comparison of the conflicts in each case

²⁸ See cases cited below.

²⁹ *Jarvis v. Manlove*, 5 Harr. (Del.) 452; *McNamara v. King*, 7 Ill. 432; *Sloan v. Edwards*, 61 Md. 89; *Gaither v. Blowers*, 11 Md. 536; *Eltringham v. Earhart*, 67 Miss. 488, 19 Am. St. Rep. 319, 7 South. 346; *Dailey v. Houston*, 58 Mo. 361; *Heneky v. Smith*, 10 Or. 349, 45 Am. Rep. 143; *Schelter v. York*, *Crabbe*, 449, 21 Fed. Cas. No. 12,446. But in an ordinary action, where there is no aggravation, evidence admitted to show plaintiff's

poverty and that the defendant, a landlord's agent, was hard-hearted, was properly held error: *Marsh v. Bristol*, 65 Mich. 378, 32 N. W. 645.

³⁰ *Cochran v. Ammon*, 16 Ill. 316.

³¹ *McNamara v. King*, 2 Gilm. (Ill.) 432.

³² *McAlmont v. McClellan*, 14 Serg. & R. (Pa.) 363; *Clements v. Maloney*, 55 Mo. 352; *Shute v. Barrett*, 7 Pick. (Mass.) 82; *Larned v. Buffington*, 3 Mass. 546, 3 Am. Dec. 185. See § 159, *ante*.

we are able to deduce, that, taking the whole genus of torts, the better law seems to be with the weight in favor of the admissibility of evidence of the plaintiff's financial condition. Why in some states the plaintiff's wealth may be shown but not his poverty is not easily accounted for, but as financial condition covers both terms, such isolated cases need no serious attention. In these days of broad common-sense rulings on such subjects, the lawyer will find himself safe with the majority opinion.³³ In actions for *malicious prosecution* the language of Cowen, J., is very emphatic:³⁴ "When the plaintiff finally thought it his duty to threaten a resort to legal redress, he is answered, 'You will be lawed till you are sick of it. You may squirt your damndest.' There was something to apprehend from such a reply; for the defendants had the command of great wealth, and the plaintiff was a poor man who had just commenced life. . . . That the jury should have been somewhat transported with indignation by the view which we think they had a right to take of this matter, is highly probable; a consequence which the defendants could hardly escape,

³³ *Peltier v. Mict*, 50 Ill. 511; *Clements v. Maloney*, 55 Mo. 352; *Reeves v. Winn*, 97 N. C. 246, 2 Am. St. Rep. 287, 1 S. E. 448. In *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185, it was held that in an action of slander the plaintiff may give in evidence, to aggravate the damages, his own rank and condition of life, and also that the defendant may avail himself of such evidence when it will have a legal tendency to mitigate the damages. See *McAlmont v. McClelland*, 14 Serg. & R. (Pa.) 363. The pecuniary circumstances of the plaintiff and his family, and all the circumstances of the case, may be taken into consideration, and exemplary damages may be awarded: *Clements v. Maloney*, 55 Mo. 352; *Shute v. Barrett*, 7 Pick. (Mass.) 82. It is held that evidence of the plaintiff's

property is not admissible in an action of slander, in *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; on the subject generally in such actions see note to *Jones etc. Co. v. George*, 10 Ann. Cas. 288. As to actions for personal injury not resulting in death, see note to *Washington Times Co. v. Downey*, 6 Ann. Cas. 768. In *Pool v. Devers*, 30 Ala. 672, the law of Alabama is plainly expressed by the court. That the plaintiff was a poor man was not a legitimate matter for the consideration of the jury, in any point of view: *Adams v. Adams*, 29 Ala. 433; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489. And this case was followed in *Perrine v. Winter*, 73 Iowa, 645, 33 N. W. 679.

³⁴ *Bump v. Betts*, 23 Wend. (N. Y.) 85. See § 159, *ante*.

were we to send the cause down and order it retried. It must still be tried by men, and by civilized men." And in such cases evidence of the plaintiff's financial condition is admissible.³⁵ In actions for *seduction*, the rule is so far extended that proof may be given not only of the standing and rank of the plaintiff and of the person seduced, but as to the rank and standing of her family in the community. It has been repeatedly held, that, in this action, the father may recover not only the damages he has sustained, by the loss of service, and the payment of necessary expenses, but the jury may award him compensation for the dishonor and disgrace cast upon him and his family, and for the being deprived of the society and comfort of his daughter. In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages, for the double purpose of setting an example, and of punishing the wrongdoer. For these purposes, proof of the condition in life, and circumstances, as well of the father and his family, as of the party committing the injury, is highly proper, and should be given to the jury, and considered by them in estimating the damages.³⁶ But in an

³⁵ In an action of malicious prosecution for an alleged fraudulent disposal of mortgaged property, evidence of the amount of property owned by the plaintiff is admissible, as bearing upon the question whether the defendant had reasonable ground to believe that plaintiff had disposed of the mortgaged property with intent to defraud: *Reisan v. Mott*, 42 Minn. 49, 18 Am. St. Rep. 489, 43 N. W. 691. In *Tykeson v. Bowman*, 60 Minn. 108, 61 N. W. 909, it was held competent for the plaintiff to prove that at the time a writ of attachment was issued he was indebted to no one but the defendant. See, also, *Yarbrough v. Hudson*, 19 Ala. 653; *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204; *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. 751.

³⁶ *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *Herring v. Jester*, 2 Houst. (Del.) 66; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; *McAulay v. Birkhead*, 35 N. C. 28, 55 Am. Dec. 427, and note; *Lee v. Hodges*, 13 Gratt. (Va.) 726; *Riddle v. McGinnis*, 22 W. Va. 253; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Dec. 768, 9 N. W. 599; *Salter v. Walker*, 21 L. T., N. S., 360, 18 Wkly. Rep. 65; *Wilson v. Sproul*, 3 Penn. & W. (Pa.) 49; *Parker v. Monteith*, 7 Or. 277; *Thompson v. Clendening*, 1 Head (Tenn.), 287. But not of the individuals in the family: *Thompson v. Clendening*, 1 Head (Tenn.), 287. General good character of the plaintiff

Iowa case, where the plaintiff in the court below was permitted to show that she was a poor girl and had no means of support as well as other similar facts, the judgment was reversed.³⁷ In actions of this nature it has been held admissible for the *defendant*, in the first instance, to offer proof of his financial condition to reduce damages on the ground that his pecuniary standing is a material element.³⁸ But this is clearly illogical. The law is well stated in a Missouri case:³⁹ "The defense offered to show defendant's pecuniary condition, and this was ruled out. I have no doubt about the correctness of the decision. Plaintiff had introduced no evidence in reference to the wealth of the defendant. The evidence was not, therefore, in rebuttal of any issue tendered on the other side; and it would be a strange proceeding to permit him to show his pecuniary circumstances, to decrease the damages occasioned by his own wrong. Under that view it would be only necessary for a man to show that he was very poor to escape with comparative impunity." The financial condition of the plaintiff may be shown in actions for *breach of contract of marriage*. In announcing this rule Judge Cooley used the following language: "When the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements; and it is not improper that the jury should know of it also and take it into account in making up their verdict."⁴⁰ It seems to follow, if the social and financial condition of the defendant is proper to be shown as affecting the advan-

and family are not admissible in absence of impeaching testimony on the part of the defense: *Haynes v. Sinclair*, 23 Vt. 108.

³⁷ *West v. Druff*, 55 Iowa, 335, 7 N. W. 636.

³⁸ *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208.

³⁹ *Wilbur v. Johnson*, 58 Mo. 600.

⁴⁰ *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936. See, also, *Rutter v. Collins*, 103 Mich. 143, 61 N. W. 267.

tages of the plaintiff, that her own social and financial condition may be shown for the same reason. If she lived in poverty, or in an unhappy home, and this condition was known to the defendant when he entered into the contract of marriage by which he agreed to share his home with her, her damages by reason of the breach of the contract would necessarily be affected by the difference in their social and financial conditions. "If their social and financial conditions were equal,"⁴¹ said Mount, C. J., "there would then be no damages in that respect. We can see no good reason for admitting evidence of his condition and excluding evidence of her condition, when both are for the same purpose, and are necessary in order to determine whether there is any difference."

§ 162 (160). **Mode of proving financial standing.**—Hitherto there has been a considerable amount of controversy as to what the plaintiff should prove in those cases in which the damages sustained were sought to be enhanced by reason of the defendant's wealth. While there are several respectable authorities for each proposition, it is well to state what appears to us to be the law, in that the mode of proving the financial condition of a defendant for the purpose of increasing damages depends upon the question whether the damages to be allowed are *compensatory* or *exemplary* in their nature. The general rule appears to be, that as in the former case the damages are enhanced by the reputation of the defendant as to his circumstances and standing, therefore the evidence should relate to his *reputed wealth* and standing.⁴² In the other case the inquiry should be as to his *actual* pecuniary ability; hence the amount of his property should be stated by persons having knowledge of the subject.⁴³ The establishment of the rule in each case

⁴¹ Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769.

⁴² Stanwood v. Whitmore, 63 Me. 209; Johnson v. Smith, 64 Me. 555; Kniffen v. McConnell, 30 N. Y. 285;

Rea v. Harrington, 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. 475; Eggett v. Allen, 106 Wis. 633, 82 N. W. 556.

⁴³ Greeneberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050;

serves very little end in practical application, however, where the plaintiff is called upon to give evidence of the actual wealth of a defendant. In Illinois, in a case which has served good purpose,⁴⁴ the court say: "We would here observe that the practice has grown up, though not generally customary, of raising a sort of collateral issue upon the question of pecuniary circumstances, involving a detail as to lists, kind, and value of property. This is not within the purpose or scope of its admissibility. The inquiry in the first instance should be general, whether the party be in poor, moderate, or good circumstances; if good, how good, leaving special inquiries to be made on cross-examination." This is the rule recognized in all the courts which hold that the pecuniary circumstances of the parties may be given in evidence upon the general question of damages, both compensatory and punitive. And it would seem that where the pecuniary circumstances of a defendant are held to be admissible upon the question of compensatory damages, evidence of the actual wealth of the defendant should

Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284; *Jones v. Jones*, 71 Ill. 562; *Chicago v. O'Brennan*, 65 Ill. 160; *Atkinson v. Van Cleave*, 25 Ind. App. 508, 57 N. E. 731; *White v. White*, 76 Kan. 82, 90 Pac. 1087; *Louisville C. & L. R. Co. v. Mahony*, 7 Bush (Ky.), 235; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Sloan v. Edwards*, 61 Md. 101; *Cohen v. Goldberg*, 65 Minn. 473, 67 N. W. 1, 149; *McCarthy v. Niskern*, 22 Minn. 90; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53; *Schafer v. Ostmann*, 148 Mo. App. 644, 129 S. W. 63; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W. 209; *Clark v. Fairley*, 30 Mo. App. 335; *Dailey v. Houston*, 58 Mo. 361; *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584; *Belknap v. Boston etc. R. Co.*, 49 N. H. 358; *Fry v. Bennett*, 4 Duer (N. Y.), 247; *King v. Hanson*, 13 N. D.

85, 99 N. W. 1085; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Willett v. Johnson*, 13 Okl. 563, 76 Pac. 174; *Calder v. Southern R. Co.*, 89 S. C. 287, 71 S. E. 841; *Hiers v. Atlantic etc. R. Co.*, 79 S. C. 115, 60 S. E. 1110; *Nashville St. R. Co. v. O'Bryan*, 104 Tenn. 28, 55 S. W. 300; *Thomas v. Williams*, 139 Wis. 467, 121 N. W. 148; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227; *Eggett v. Allen*, 106 Wis. 633, 82 N. W. 556; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206; *Brown v. Evans*, 17 Fed. 912, 8 Saw. 488. This was formerly the law in Kentucky until *Givens v. Berkley*, 108 Ky. 236, 56 S. W. 158, overruled the cases supporting it, in a very questionable decision.

⁴⁴ *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100.

not be admitted; but where evidence of the wealth of the defendant is admitted for the purpose of enhancing the exemplary or punitive damages, the actual wealth of the defendant may be shown.⁴⁵ Sutherland, in dealing with the increase of compensatory damages by proof of the wealth of defendant, says:⁴⁶ "This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater. But in such cases, as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank, the testimony should correspond, and only the general question as to his circumstances can be asked, and not the details. But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger. For this purpose the reputed wealth of the defendant may be proven, subject to his right to controvert the plaintiff's evidence." We think the rule stated by the Illinois court is the true rule to be adopted. It is the only practical rule. In most cases evidence of reputed wealth would be the only evidence the plaintiff could make upon the point, and in cases where such reputed wealth is not to conclude the defendant, he always has it in his power to present

⁴⁵ *Johnson v. Smith, supra*. This case, however, only goes the length of saying that where the plaintiff had made out a case which would entitle him to demand exemplary damages, and had given no evidence as to the financial circumstances of the defendant, the defendant might introduce evidence of his real financial condition as bearing upon the question as to the amount of the exemplary damages which the jury ought to assess against him; and that in such case the rule that the reputed wealth of

the defendant could only be shown did not apply. But the case does not decide that the plaintiff may not in such case show the reputed wealth of the defendant to enhance the exemplary damages; but it does hold that when no evidence is given on the subject, and, impliedly, that when such evidence is given, the defendant may answer it by showing his real financial condition: *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527.

⁴⁶ 2 Sutherland on Damages, §§ 404, 405, and cases there cited.

the real facts to the jury in answer to the general proofs of the plaintiff.⁴⁷ The simple solution of this by no means difficult problem is that in both instances the plaintiff should give evidence concerning the defendant's financial position. In the one case it is evidence of wealth, in the other the reputation of wealth. If the case is one in which it is sought to enhance the compensatory damages the plaintiff may rest with giving evidence of the defendant's reputation for wealth, while if he seeks exemplary damages the nature of the evidence must be of the wealth itself and not the reputation for it; in other words, that defendant is a large land owner, or holder of stocks, or money or property, to the best of the means of knowledge at the plaintiff's disposal, leaving it to the defendant to disclaim. While we acknowledge the distinction as existing, we see, as we have said, no practical use whatever in it, as the same evidence should be sufficient in all cases where the damages are sought to be increased, namely, evidence of the defendant's reputed means, and he should have the opportunity of denying it and showing his real position. At best the evidence of it coming from the plaintiff can only be speculative, and reputation in both cases would leave the *onus* on the defendant. It need hardly be added that counsel have no right to comment in their argument upon the wealth or poverty of a party in the absence of any evidence on the subject.⁴⁸

§ 163 (161). Relevancy of facts apparently collateral—Negligence cases.—The number of cases involving negligence, especially those relating to personal injuries, does not appear to have the effect of producing anything like uniformity of decision, for we find on the same *data*, diametrically opposed conclusions. The decisions in the various states follow each the local precedents, and an attempt to generalize results only in the statement of the one set of

⁴⁷ *Draper v. Draper, supra.*

⁴⁸ *Brown v. Swinesford*, 44 Wis. 282, 28 Am. Rep. 582.

decisions qualified by the existence of others of an entirely different determination. This is distressingly apparent when there is involved in actions for negligence the consideration of questions of to what extent facts apparently collateral to the issue may be received. For example, in actions for *personal injury on a highway* it may become relevant to show, for the purpose of proving *notice* on the part of the municipality, that *other persons have received injuries* at the same place. It may at once be said here that evidence of other accidents occurring from the same cause is by many courts held incompetent;⁴⁹ and that we think the better reasoning shows that such holding is not sound. In a Wisconsin case *Cole*, C. J., admitted the difficulty of the conflict, but his remarks are really a support of the proposition he was constrained to condemn, although the explanation is offered that the evidence was not offered for the purpose of showing notice but to prove the defect.⁵⁰

⁴⁹ *Cunningham v. Clay Tp.*, 69 Kan. 373, 76 Pac. 907; *Bremner v. New-castle*, 83 Me. 415, 23 Am. St. Rep. 782, 22 Atl. 382; *Blair v. Pelham*, 118 Mass. 420; *Merrill v. Bradford*, 110 Mass. 505 (an accident a year before); *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894 (nor even that defendant had had actual knowledge of prior accidents at the same place).

⁵⁰ *Phillips v. Willow*, *supra*. The learned judge said that the cases were not in accord. "In some it is held that the evidence of other accidents, or of the effect on carriages driven by other persons than the plaintiff over the same road, is competent, because it has a tendency to show its fitness or unfitness for public travel: *Kent v. Lincoln*, 32 Vt. 591; *Quinlan v. Utica*, 11 Hun (N. Y.), 217; or tends to prove that the object was or was

not naturally calculated to frighten horses: *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *House v. Metcalf*, 27 Conn. 632; or to show knowledge on the part of the city that a bridge was not properly lighted so as to be safe to persons crossing it: *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; or to show the result of experience or experimental knowledge of the possibility of the negligent act relied on as causing the injury: *Pig-got v. E. C. R. Co.*, 3 Com. B. 229; and *Morse v. M. & St. L. Ry. Co.*, 30 Minn. 465, 16 N. W. 358. Other courts have held, as this court did in the *Bloor* case, that all evidence as to collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded, because such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, because the ad-

So far as the occurrence of other accidents at the same place is concerned, as matter of notice to the municipality responsible, there need be no hesitancy about accepting the rule of its admissibility. The objection to it as tending to introduce collateral issues and thus lead away the jury's attention is absolutely illogical and is surely foundationless. As Mr. Justice Field says:⁵¹ "No dispute was made as to these (prior) accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. . . . Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities." There is no necessity to quote from other authorities, that in this class of cases the character of the place of the accident is one of the subjects of inquiry pertinent both as to notice and as to the condition of the *locus in quo*, and if the defendant comes into court saying he is unprepared, the fault lies with himself. He of all others should know the character of the

verse party, having had no notice of such a course of examination, is not presumably prepared to meet it: 1 Greenl. Ev., § 52; Collins v. Dorchester, 6 Cush. (Mass.) 396; Parker v. Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Hudson v. Chicago etc. R. R. Co., 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, and the authorities referred to in these opinions."

⁵¹ District of Columbia v. Armes, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840. Approved in Yates v. Covington, 119 Ky. 232, 83 S. W. 593, applying rule in action against city for injuries caused by defective sidewalk; Nashville R. R. Co. v. Howard, 112 Tenn. 115, 64 L. R. A. 437, 78 S.

W. 1100, in action for injuries to street-car passenger owing to sudden jolting of car caused by defective track, evidence of others that they had been nearly thrown from car at that point on other occasions is admissible; Powell v. Nevada etc. Ry., 28 Nev. 63, 78 Pac. 979, in action for injuries caused by fall from cart when horse frightened by defendant's steam whistle, evidence of frightening of other team admissible; Smith v. Seattle, 33 Wash. 485, 74 Pac. 675, evidence that others at other times had fallen on obstruction in street by which plaintiff injured was admissible; C. L. Thompson's Notes to U. S. Reports.

place, it is his charge and duty to know it, and the proposition that testimony with regard to it is part of the *res gestae* is nearer the law than that the evidence is collateral.⁵² The weight of authority is well in favor of the admission of such testimony to support the allegation of knowledge on the part of the defendant.⁵³ There is a class of decisions in which it is held that in suits for injuries caused by defective streets it is relevant for the plaintiff to prove other similar accidents for the purpose of showing the dangerous character of the street. And from what we have said with regard to the relevancy of such testimony in proof of *scienter*, it will be gathered that we apply the same reasoning to its relevancy in showing the dangerous character of the street. The opinion of Mr. Justice Field already quoted cannot be shaken. In a Vermont case⁵⁴ testimony of various witnesses was admitted as to the effect of driving over a defective street. Poland, J., said: "One important point in the case, and in all this class of cases, is whether the condition of the road was such as to make it insufficient and unsafe for public travel. The effect, which this bar had upon a carriage passing over it, would aid in determining that question, whether the carriage driven over it was like the one the plaintiff drove or

⁵² *Smith v. City of Seattle*, 33 Wash. 481, 74 Pac. 674.

⁵³ *Bailey v. Trumbull*, 31 Conn. 581; *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624; *Kolb v. Chicago Stamping Co.*, 33 Ill. App. 488; *Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216, 37 N. E. 696; *Chicago v. Powers*, 42 Ill. 169; *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *O'Mara v. Newton etc. R. Co.*, 140 Iowa, 190, 118 N. W. 377; *Shea v. Glendale Elms. F. Co.*, 162 Mass. 463, 38 N. E. 1123; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Lombar v. Tawas*, 86 Mich. 14, 48 N. W. 947; *Smith v. Sherwood*, 62

Mich. 159, 28 N. W. 806; *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650; *Griffin v. Auburn*, 58 N. H. 121; *Walker v. Westfield*, 39 Vt. 246; *Kent v. Lincoln*, 32 Vt. 591; *Hansen v. Seattle Lumb. Co.*, 41 Wash. 349, 83 Pac. 102; *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256; *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731; *Scott v. New Orleans*, 75 Fed. 373, 21 C. C. A. 402; *Osborne v. Detroit*, 32 Fed. 636; *District of Columbia v. Armes*, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840. See note to *Gastel v. New York*, 16 Ann. Cas. 636.

⁵⁴ *Kent v. Lincoln*, 32 Vt. 591.

not. The effect on any carriage would be proper to be considered by the jury. The main objection made to this evidence is that it was not shown that these persons drove with reasonable prudence and care, and that, as the plaintiff could not recover unless he used such prudence and care in driving, therefore no effect of the road upon a carriage was proper evidence, unless proved to be driven in that manner. But we think this does not follow, and that it might be shown what effect was produced on a carriage driven at a speed conceded to be unreasonable and unsafe for an ordinary traveler. All these effects produced in going over the road were in the nature of experiments to show the actual condition of the road at the time, and whether it was safe or unsafe. The more minutely and clearly each one was understood by the jury, the rate and manner of the driving, the kind of the carriage used, and the exact effect produced upon it, the more valuable would the evidence become, but neither party could make such evidence improper by omitting inquiries that would elicit all these particulars." When the rule for the exclusion of collateral evidence is carefully examined, and it is recognized that those facts only which are not capable of affording any reasonable presumption or inference as to the principal fact or matter in dispute should not be admitted in order to keep the minds of the jurors free to consider the issues,⁵⁵ it must be conceded that so far from misleading the jury the evidence of similar accidents at the same place rather focuses their attention on what is sought to be established, namely, the dangerous nature of that particular portion of the road. To that extent it bears directly upon the issue and is therefore relevant. And even though it did not bear directly on the issue, the necessity for its doing so does not exist. It is sufficient if it *tends* to prove the issue or constitutes a link in the chain of proof.⁵⁶ Although this view is so well sustained by

⁵⁵ 1 Greenl. Ev., § 52.

⁵⁶ 1 Greenl. Ev., § 51a; Southern R. Co. v. Posey, 124 Ala. 486, 26 South.

914; Birmingham v. Starr, 112 Ala.

98, 20 South. 424; Birmingham U. R. Co. v. Alexander, 93 Ala. 133, 9 South.

numerous cases, it has been assailed by the untenable objection above mentioned, that it permits the introduction of numerous collateral issues whereby the attention of the jury may be diverted from the main question and which nevertheless has the support of very high authority.⁵⁷ A

525; *Chicago Mill etc. Co. v. Ross* (Ark.), 139 S. W. 632; *Bailey v. Trumbull*, 31 Conn. 581; *House v. Metcalf*, 27 Conn. 631 (proof that other horses had been frightened by same object allowed); *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194; *Jacksonville etc. R. Co. v. Peninsular Land etc. Mfg. Co.*, 27 Fla. 1, 157, 17 L. R. A. 33, 9 South. 661; *Gilmer v. Atlanta*, 77 Ga. 688; *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *East St. Louis etc. R. Co. v. Zink*, 133 Ill. App. 127; *Aurora v. Plummer*, 122 Ill. App. 143; *Lowe v. Alton Baking etc. Co.*, 158 Ill. App. 458; *Rockford Gas Light etc. Co. v. Ernst*, 68 Ill. App. 300; *Cleveland etc. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341; *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Moore v. Burlington*, 49 Iowa, 136; *Madison Twp. v. Scott*, 9 Kan. App. 871, 61 Pac. 967; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677; *Georgetown etc. Turnpike Road Co. v. Cannon*, 7 Ky. Law Rep. 379; *Carroll v. Boston etc. R. Co.*, 200 Mass. 527, 86 N. E. 793; *Shea v. Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123; *Ainsworth v. Hover*, 162 Mich. 135, 127 N. W. 325; *Bowen v. Flint etc. R. Co.*, 110 Mich. 445, 68 N. W. 230; *Retan v. Lake Shore etc. Ry. Co.*, 94 Mich. 146, 53 N. W. 1094; *Phelps*

v. Winona etc. R. Co., 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273; *Winkle v. Dry Goods Co.*, 132 Mo. App. 656, 112 S. W. 1026; *Patton v. St. Louis etc. R. Co.*, 87 Mo. 117, 56 Am. Rep. 446; *Keene v. Eastman*, 75 N. H. 191, 72 Atl. 213; *Haseltine v. Concord R. Co.*, 64 N. H. 545, 15 Atl. 143; *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489; *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55 (elaborate discussion); *Fordham v. Gouverneur*, 160 N. Y. 541, 55 N. E. 290; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357; *Quinlan v. Utica*, 11 Hun (N. Y.), 217; *S. C.*, 74 N. Y. 603; *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560, 40 Am. St. Rep. 686, 35 N. E. 55; *Butcher v. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626; *Smith v. Chicago etc. R. Co.*, 4 S. D. 71, 55 N. W. 717; *Missouri Pac. R. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163; *Kent v. Lincoln*, 32 Vt. 591; *Cheney v. Ryegate*, 55 Vt. 499; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394; *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; *District of Columbia v. Arms*, 107 U. S. 519, 27 L. Ed. 618, 2 Sup. Ct. Rep. 840; *Scott v. New Orleans*, 75 Fed. 373, 21 C. C. A. 402; *R. Co. v. McLaren*, 8 Ont. App. 564.

⁵⁷ *Ramsey v. Rushville & M. G. R. Co.*, 81 Ind. 394; *Mathews v. Cedar*

parallel conflict has arisen as to whether, in actions against railroad companies, proof of other *similar accidents under similar conditions* may be received. Proof of the happening of a prior accident in the same place has frequently been held to be competent upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to be unsafe and dangerous, and the evidence becomes proper where evidence is first adduced showing that the conditions are similar. While the evidence is, of course, not receivable to prove prior acts of negligence, yet as in the case of ordinary street accidents due to a defect in the road, the evidence is admissible to support the fact of notice to the defendant. The weight of authority is clearly in support of the admissibility.⁵⁸

Rapids, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; Schoonmaker v. Wilbraham, 110 Mass. 134; Kidder v. Dunstable, 11 Gray (Mass.), 342; Collins v. Dorchester, 6 Cush. (Mass.), 396; Aldrich v. Pelham, 1 Gray (Mass.), 510; Bremner v. New Castle, 83 Me. 415, 23 Am. St. Rep. 782, 22 Atl. 382; Branch v. Libbey, 78 Me. 321, 57 Am. Rep. 810, 5 Atl. 71; Parker v. Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Hubbard v. Androscoggin etc. R. Co., 39 Me. 506; Goble v. Kansas City, 148 Mo. 470, 50 S. W. 84; Dubois v. Kingston, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; Richard v. Oshkosh, 81 Wis. 226, 51 N. W. 256; Phillips v. Willow, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731; Barrett v. Hammond, 87 Wis. 654, 58 N. W. 1053; Elliott, Roads and Streets, 463, 646.

⁵⁸ Denver Tramway Co. v. Crumbaugh, 23 Colo. 363, 48 Pac. 503; Illinois C. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290; Chicago v. Dalle, 115 Ill. 386, 5 N. E. 578; Aurora v. Hillman, 90 Ill. 61; Louisville R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; Lafay-

ette v. Weaver, 92 Ind. 477; Pittsburgh etc. R. Co. v. Williams, 74 Ind. 462; Pittsburgh etc. Ry. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Armstrong v. Ackley, 71 Iowa, 76, 32 N. W. 180; Mackie v. Central R. Co., 54 Iowa, 540, 6 N. W. 723; Hill v. Portland Ry. Co., 55 Me. 438, 92 Am. Dec. 601; Phelps v. Winona & R. Co., 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273; Kolsti v. Minneapolis etc. R. Co., 32 Minn. 133, 19 N. W. 655; Morse v. Minneapolis etc. R. Co., 30 Minn. 465, 16 N. W. 358; Kelly v. Southern Minn. Ry. Co., 28 Minn. 98, 9 N. W. 588; Dundas v. Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, and note, 5 L. R. A. 143, 42 N. W. 1011; Tetherow v. St. Joseph etc. R. Co., 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310; Hirsch v. Buffalo, 107 N. Y. 671, 14 N. E. 608; Brady v. Manhattan Ry. Co., 127 N. Y. 46, 27 N. E. 368; Wooley v. Grand St. & N. R. Co., 83 N. Y. 121; Reed v. New York etc. R. Co., 45 N. Y. 574; Morrow v. Westchester Elec. R. Co., 54 App. Div. 592, 67 N. Y. Supp. 21; Mansfield C. & C. Co. v. McEnery, 91 Pa. 185, 36 Am. Rep. 662; Hiner v. Fond du Lac,

There are a few decisions which create the conflict referred to. In Maine⁵⁹ a decision of 1855 appears to have been founded on some old Massachusetts authorities which are no longer regarded as existing law,⁶⁰ and it wanders away into the same groove of declaiming against the raising a number of collateral issues without justification. The Iowa case⁶¹ simply followed the cases referred to without showing any new thought. The New York case⁶² is wrongly cited as in conflict, because the defendant in that case defended on the ground of the assumption of risk by the plaintiff, who was one of its employees, and the court lent its approval to other New York decisions admitting evidence of similar accidents.⁶³ In the Alabama case the circumstances were not similar. In the case before the court the plaintiff was knocked from the top of a car as it was going under a bridge and the evidence introduced was of an accident to a man climbing up the side of the car on the ladder.⁶⁴ In the Utah case⁶⁵ the circumstances were also dissimilar, and related to other locomotive engines starting apparently without human agency and without reference to the one that caused the injury. These cases cannot be said to conflict with the proposition laid down. The evidence tendered in them was simply not relevant. In leaving this part of the discussion we feel that the remarks of Walker, J.,⁶⁶ command reproduction: "In an action for damages resulting from the negligence of a railroad com-

71 Wis. 74, 31 N. W. 632; Spearbracker v. Larrabee, 64 Wis. 573, 25 N. W. 555; Chicago & N. W. R. Co. v. Netolicky, 67 Fed. 665, 14 C. C. A. 615.

⁵⁹ Hubbard v. Androsceoggin etc. Ry. Co., 39 Me. 506.

⁶⁰ Collins v. Dorchester, 6 Cush. (Mass.) 396; Aldrich v. Pelham, 1 Gray (Mass.), 510 (referred to *supra*).

⁶¹ Hudson v. Chicago & N. W. Ry. Co., 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692, with note showing the conflicting case.

⁶² Dye v. Delaware, L. & W. Ry. Co., 130 N. Y. 671, 29 N. E. 320.

⁶³ Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Gillrie v. City of Lockport, 122 N. Y. 403, 25 N. E. 357; Brady v. Railway Co., 127 N. Y. 46, 27 N. E. 368.

⁶⁴ Schlaff v. Louisville & N. R. Co., 100 Ala. 377, 14 South. 105.

⁶⁵ Hurd v. Union Pac. Ry. Co., 8 Utah, 241, 30 Pac. 982.

⁶⁶ In Birmingham Union Ry. Co. v. Alexander, 93 Ala. 139, 9 South. 525.

pany in obstructing a highway crossing it has been held that proof of the fact that other persons were unable to cross, and of the efforts they made to do so, was competent for the purpose of showing the obstructed and unsafe condition of the highway.⁶⁷ It would therefore have been competent for the plaintiff to prove that other similar casualties had happened at that crossing as tending to show a defective condition of the track. On like considerations the defendant should be allowed the benefit of proof that the track, as it was at the time, was constantly crossed by other persons, under similar conditions, without inconvenience, hindrance, or peril, as evidence tending to show the absence of the alleged defect, or that it was not the cause to which the injury complained of should be imputed. The negative proof in the one case, equally with the affirmative proof in the other, serves to furnish the means of applying to the matter the practical test of common experience. A knowledge of the experience of others who were, in like manner with the plaintiff, brought into contact with the alleged defective structure, may enable the jury to weigh all the evidence before them in the light of the rule that like causes, operating under like conditions, produce like results. If the question is looked at from the standpoint of common sense, it is plain that one seeking to reach a satisfactory conclusion as to whether or not the defect existed or caused the injury would not reject the aid furnished by the fact that other vehicles were constantly passing over the track at that point without any observable hindrance." The authorities are divided as to the relevancy of showing that other persons have passed over the same walk or street without injury, the weight being against the admissibility of such evidence.⁶⁸ At the same

⁶⁷ *Phelps v. Winona R. R. Co.*, 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273.

⁶⁸ *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955; *Bauer v. Indianapolis*, 99 Ind. 56; *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810, and

note, 5 Atl. 71; *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605; *Kidder v. Dunstable*, 11 Gray (Mass.), 342; *Anderson v. Taft*, 20 R. I. 362, 39 Atl. 191.

time it has been held that evidence that a number of persons passed along a sidewalk without harm is admissible, in an action to recover damages for injuries received from slipping on a formation of ice extending entirely across the sidewalk, to show that the ice was not slippery and dangerous, for the attention of all who passed over the sidewalk would necessarily be drawn to the ice, and their experience be substantially the same.⁶⁹ But it is not relevant to show that a crossing complained of is not different from other crossings of that character in the same city.⁷⁰ So it is not relevant to show the condition of the ways in other parts of the country, or to show the *practice of towns or counties* in respect to them.⁷¹ Nor in an action against a railroad company is it relevant to show that accidents have not happened under similar conditions;⁷² nor is it competent to prove the custom of other railroad companies as to keeping their turntables locked,⁷³ or as to the blowing of whistles,⁷⁴ or as to the employment of watchmen for bridges.⁷⁵ If the use by the railroad company of the highway, at the time of an accident, was reasonable and lawful, the plaintiff can have no greater rights because on other occasions the railroad company had been guilty of

⁶⁹ *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194. See *Birmingham Union Ry. Co. v. Alexander*, *supra*, to the same effect in certain cases. In *Smith v. Gilman*, 38 Ill. App. 393, evidence was properly admitted to show that on other nights than the one in which the injury was sustained, the plaintiff went over the same walk without difficulty or danger. Reasons for admitting this class of testimony also will be found in *Chicago B. & Q. R. R. Co. v. Gregory*, 58 Ill. 274.

⁷⁰ *Bauer v. Indianapolis*, 99 Ind. 56. But it may be shown on the question of care that the sidewalk on the opposite side of the street was also defective: *Hoffman v. North Milwaukee*, 118 Wis. 278, 95 N. W. 274. See

note on general condition and other accidents as evidence of negligence on part of municipality in respect of highway to *Elam v. Mt. Sterling*, 20 L. R. A., N. S., 665.

⁷¹ *Hinckley v. Barnstable*, 109 Mass. 126; *Kenworthy v. Ironton*, 41 Wis. 647. But see *Packard v. New Bedford*, 9 Allen (Mass.), 200.

⁷² *Louisville etc. Ry. Co. v. Commonwealth*, 80 Ky. 143, 44 Am. Rep. 468; *Jarvis v. Brooklyn El. R. Co.*, 16 N. Y. Supp. 96.

⁷³ *Koons v. St. Louis etc. Ry. Co.*, 65 Mo. 592; *Gulf C. & Santa Fe Ry. Co. v. Evansich*, 61 Tex. 3.

⁷⁴ *Hill v. Portland Ry. Co.*, 55 Me. 438, 92 Am. Dec. 601.

⁷⁵ *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

misconduct; just as the railroad company cannot show their general carefulness as an excuse for the specific carelessness at the time in question. But although a custom cannot be proved as an excuse for a negligent act, there are numerous cases in which, under peculiar circumstances, usage has been held relevant to show what constitutes negligence or as bearing on the question of negligence in the given case.⁷⁶ So when the question relates to the degree of care used at the time of a given accident, the evidence must be confined to that issue and it is irrelevant to show that the *party is ordinarily careful* or otherwise;⁷⁷ although, in exceptional cases, it has been held relevant to show former and similar acts of negligence by the same persons for the purpose of proving the negligence alleged.⁷⁸

76 Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425, 20 South. 566; Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; North Chicago St. R. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077; North Chicago St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849, 85 Ill. App. 316; Coates v. Burlington Ry. Co., 62 Iowa, 486, 17 N. W. 760; Jeffrey v. Keokuk Ry. Co., 56 Iowa, 546, 9 N. W. 884; Central Ry. T. Co. v. Chapman (Ky.), 124 S. W. 830; Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737; Anderson v. Minneapolis St. R. Co., 42 Minn. 490, 18 Am. St. Rep. 525, 44 N. W. 518 (crowding of cars); Kolsti v. Minneapolis Ry. Co., 32 Minn. 133, 19 N. W. 655; Kelly v. Southern Ry. Co., 28 Minn. 98, 9 N. W. 588; Henry v. Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214; Aldrich v. Monroe, 60 N. H. 118; Hirschberg v. Brooklyn etc. Ry. Co., 134 App. Div. 629, 119 N. Y. Supp. 492; Gleason v. Metropolitan St. R. Co., 99 App. Div. 209, 90 N. Y. Supp. 1025; Houston etc. Ry. Co. v. Cowser,

57 Tex. 293; Newport News & O. P. R. & Elec. Co. v. Bradford, 100 Va. 231, 40 S. E. 900; Lightfoot v. Winnebago Trac. Co., 123 Wis. 479, 102 N. W. 30; Mayer v. Milwaukee St. R. Co., 90 Wis. 522, 63 N. W. 1048; Chicago, Milwaukee & St. Paul Ry. Co. v. Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 Sup. Ct. Rep. 281; Nassau Elec. Co. v. Corliss, 126 Fed. 355, 61 C. C. A. 257.

77 Tenney v. Tuttle, 1 Allen (Mass.), 185; Gahagan v. Boston etc. Ry. Co., 1 Allen (Mass.), 187, 79 Am. Dec. 724, and note; Robinson v. Fitchburg etc. Ry. Co., 7 Gray (Mass.), 92; McDonald v. Savoy, 110 Mass. 49; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807.

78 In State v. Manchester etc. Ry. Co., 52 N. H. 528, the opinion dealing with that particular phase of the case reads: "If, in this case, it had been charged that these agents of the corporation had knowingly, intentionally, willfully, or maliciously done or omitted to do any act for the purpose of injuring the deceased or anybody else, then the only question would be, Was the act done, or omitted, as

In an action where it is claimed that the defendant is liable on account of the negligence of a servant, it is not relevant to show *specific acts of negligence on the part of such servant* not connected with the act in question without bringing knowledge of the acts home to the defendant.⁷⁹ But when the general fitness and capacity of a servant are involved, his prior acts and conduct on specific occasions are relevant when it is proven that the principal had knowledge of

charged, and did the knowledge, the intention, the will, or the malice, exist when the act was done or omitted? But when the question is, Did these servants of the road, without any intention whatever, and through mere negligence or carelessness, omit to give these signals on that occasion? we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were probably negligent and careless, because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard."

⁷⁹ Tuthill v. Belt Ry. Co., 145 Ill. App. 50; Pittsburgh F. W. R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Baltimore Elev. Co. v. Neal, 65 Md. 438, 5 Atl. 338; Maguire v. Middlesex Ry. Co., 115 Mass. 239 (car driver); Farwell v. Boston & W. R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339; Collins v. Dorchester, 6 Cush. (Mass.) 396; Robinson v. Fitchburg & W. R. R., 7 Gray (Mass.), 92; Michigan Cent. Ry. Co. v. Gilbert, 46 Mich. 176, 9 N. W. 243 (yardmaster); Grand Rapids & Indiana R. R. v.

Huntley, 38 Mich. 540, 31 Am. Rep. 321; Detroit & Mil. R. R. v. Van Steinburg, 17 Mich. 111; Quincy Mining Co. v. Kitts, 42 Mich. 34, 3 N. W. 240; Davis v. Detroit & Mil. R. R., 20 Mich. 105, 4 Am. Rep. 364; Michigan Cent. R. R. Co. v. Dolan, 32 Mich. 510; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Laning v. N. Y. Cent. R., 49 N. Y. 521, 10 Am. Rep. 417; Chapman v. Erie Ry., 55 N. Y. 579; Baulee v. New York etc. Ry. Co., 59 N. Y. 356, 17 Am. Rep. 325 (switchman); Russell v. Hudson River R. Co., 17 N. Y. 134; Warner v. Erie Ry., 39 N. Y. 468; Warner v. New York etc. Ry. Co., 44 N. Y. 465 (flagman); Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Coon v. Syracuse etc. R. R. Co., 5 N. Y. 492; Wright v. N. Y. C. R. R., 25 N. Y. 566; Sherman v. Rochester & S. R. R. Co., 17 N. Y. 153; Moran v. New York etc. R. R. Co., 3 Thomp. & C. 770, 67 Barb. (N. Y.) 96; Frazier v. Pennsylvania R. R., 38 Pa. 104, 80 Am. Dec. 467; Hard v. Vermont etc. R. R. Co., 32 Vt. 473; Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018; Hutchinson v. York R. Co., 5 Ex. (M. H. & G.) 343; Priestley v. Fowler, 3 M. & W. 1; Wilson v. Merry, L. R. 1 Sc. & Div. App. 326; Keegan v. Western R. R. Corp., 8 N. Y. 175, 59 Am. Rep. 476.

such acts and when the principal is charged with negligence in retaining the servant.⁸⁰ The weight of authority is against the relevancy of the servant's reputation for carefulness except it is challenged by evidence of incompetency.⁸¹

§ 164 (161). **Same, continued—Cause and effect.**—The same effort is constantly made to exclude evidence of cause and effect on the ground of raising other issues, and when the evidence offered would raise a distinctly collateral issue, it is not admissible. But it is here, on the admittedly fine distinguishing line, that the discretion of the judge is called into play. When the evidence is capable of being presented as tending to prove the claim of the party, it does not belong to the collateral class and should be received. When the issue was raised *whether a given effect has been produced* or can be produced by the causes alleged, the courts have frequently admitted evidence apparently collateral, when the facts presented such points of similarity as to afford reasonable *data* for a conclusion; for example, evidence has been received that other property than that in question similarly situated, and not too remote, has been damaged by the escape of smoke or gas or dust or by the flow of water or by other causes where the

⁸⁰ Alabama R. Co. v. Vail, 155 Ala. 382, 46 South. 587; Giordano v. Brandywine Granite Co., 3 Penne. (Del.) 423, 52 Atl. 332; Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. 733; Pittsburg etc. Railway Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Tucker v. Missouri etc. Tel. Co., 132 Mo. App. 418, 112 S. W. 6; Grube v. Missouri Pac. R. Co., 98 Mo. 330, 14 Am. St. Rep. 645, 4 L. R. A. 776, 11 S. W. 736; State v. Manchester etc. R. R. Co., 52 N. H. 528; Baulee v. New York etc. Ry. Co., 59 N. Y. 356, 17 Am. Rep. 325; Frazier v. Pennsylvania Ry. Co., 38 Pa. 104, 80 Am. Dec. 467; Moering v. Falk, 141 Wis.

294, 18 Ann. Cas. 926, 124 N. W. 402; Young v. Milwaukee Gas Light Co., 133 Wis. 9, 113 N. W. 59; Pittsburgh R. Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437.

⁸¹ Montgomery etc. R. Co. v. Edmonds, 41 Ala. 667; Young v. Crystal Ice Co., 83 Conn. 718, 76 Atl. 514; T. & H. Pueblo Bldg. Co. v. Klein, 5 Colo. App. 348, 38 Pac. 608; Dunham v. Rackliff, 71 Me. 345; Boick v. Bissell, 80 Mich. 260, 45 N. W. 55; Wooster v. Broadway etc. R. Co., 72 Hun, 197, 25 N. Y. Supp. 378; Galveston etc. R. Co. v. Olds (Tex. Civ. App.), 112 S. W. 787; Bryant v. Central Vermont R. Co., 56 Vt. 710.

circumstances are such as tend to show that the same cause has or has not produced a similar result in the case on trial. In a New Hampshire case⁸² there is an excellent illustration of this. The plaintiff's complaint was that sewage was discharged into his cellar by reason of the clogging and incapacity of the sewer which was bifurcated at its connection with two streets; and evidence was offered as to the effect on the other fork of it, which, if affected in the same way as that which damaged the plaintiff, would help his case. The incapacity of the sewer and the debris put into it may have been so related in causing an overflow or set-back as to manifest their effect at one time on one street and at another time on another street. It is not improbable that the accumulation of debris at the junction, produced in part by the smallness of the sewer, may have been so located as to impede the flow in one branch more than in the other, and thus to produce an overflow upon one branch of the system alone. Hence the flooding of cellars in one street, said Walker, J., "might be produced by the same defects in the sewer in conjunction with solid matter allowed to accumulate in it, which at another time would produce a flooding of the cellars situated on the other branch of the sewer. The defendant's negligence in the construction and care of the sewer might be the same in both instances; and evidence of its effect on one branch of the system at one time would have some tendency to show that it was the proximate cause of a similar effect on the other branch at another time. As the evidence may have had some legitimate probative bearing, the question of its admissibility presents only a question of remoteness, which was properly determinable by the trial court."⁸³ As we have said, it has often been urged

⁸² *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895.

⁸³ *Birmingham v. Starr*, 112 Ala. 98, 20 South. 424; *Bradley v. Railway Co.*, 111 Iowa, 562, 82 N. W. 996; *Junction City v. Blades*, 1 Kan.

App. 85, 41 Pac. 677; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Yore v. Newton*, 194 Mass. 250, 80 N. E. 472; *Eidt v. Cutter*, 127 Mass. 522; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895; *Hine v. Railway Co.*,

that such testimony leads to many collateral issues and on that account it has been rejected;⁸⁴ but in most of the instances the causes have not been similar, and the discretion of the trial judge is called into action to enable him to determine both the comparison of the conditions and the proximity or remoteness of the cause which may affect the relevancy of the evidence.⁸⁵

§ 165 (162). Same, continued—Habits of animals.—

It so frequently happens in negligence cases that the behavior of animals has had something to do with a resulting injury that the courts administer the general rule so as not to exclude proof of their habits when the evidence becomes material. Such habits are held to be in their nature continuous and may be proved by successive acts of a similar kind.⁸⁶ Thus if it is material to show at the time of an accident that a horse had a *habit of shying*, instances may be proved of such shying both before and after the time of the accident. The fact that a horse driven by the plaintiff misbehaved at the time an injury was received, though such misbehavior contributed to the injury, does not necessarily preclude the party from recovering. The misbehavior may have been accidental, or from causes for which the plaintiff was under no responsibility. The misbehavior, to bar the plaintiff from recovering, must be either through the fault of the plaintiff, or by reason of a vice of the horse, for which the plaintiff is in law respon-

149 N. Y. 154, 43 N. E. 414; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681, 30 L. R. A. 651, 42 N. E. 513; *Doyle v. Railway Co.*, 128 N. Y. 488, 28 N. E. 495; *Meyer v. Wolnitzek* (Tex. Civ. App.), 63 S. W. 1058.

⁸⁴ *Metropolitan W. S. E. R. Co. v. Dickinson*, 161 Ill. 22, 43 N. E. 706; *Hughes v. General Electric L. & P. Co.*, 107 Ky. 485, 54 S. W. 723; *Louisville Water Co. v. Weis* (Ky.), 76 S. W. 356; *Fitzsimmons & Connell Co.*

v. Braun, 199 Ill. 390, 59 L. R. A. 421, 65 N. E. 249; *Timothy v. State*, 130 Ala. 68, 30 South. 339; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Commonwealth v. Piper*, 120 Mass. 185.

⁸⁵ See cases already cited.

⁸⁶ See cases cited below. For the trailing of bloodhounds as evidence, see notes to *Pedigo v. Commonwealth*, 82 Am. St. Rep. 575; *Parker v. State*, 3 Ann. Cas. 897; *Hargrove v. State*, 10 Ann. Cas. 1127.

sible. Whether or not it is a vice depends largely upon whether the misbehavior was only in a single instance, or occasional, depending upon other causes, or whether it was the habit of the horse. And, in order to establish the fact that the misbehavior was occasioned by the viciousness of the horse, it has been held to be competent to show that such misbehavior is habitual, and instances of misbehavior, as well after the injury as before, have been held competent to prove the habit.⁸⁷ The limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge. It is not, however, wholly within such discretion. "It is the right of a party to prove such instances immediately before and immediately after; but when instances are offered so remote from the time of the injury as, in the opinion of the presiding judge, to mislead or distract the minds of the jury, he may in his discretion reject the evidence; and if, in the opinion of the court such evidence was so remote as to be a fit subject for the discretion of the presiding judge, that discretion will not be revised by the full court."⁸⁸ Where the evidence was conflicting as to the *rate of speed* at which the plaintiff was driving his horse at the time of an accident, it was held relevant as tending to show the capacity of the horse for speed that before and after the accident he had been driving at a certain rate of speed on the racetrack.⁸⁹ In several cases it has been vigorously contended that where the plaintiff seeks to prove that an object is calculated to frighten horses, it is relevant to show that on other occasions the

⁸⁷ Todd v. Rowley, 8 Allen (Mass.), 51; Maggi v. Cutts, 123 Mass. 535; Broderick v. Higginson, 169 Mass. 482, 61 Am. St. Rep. 296, 48 N. E. 269. The case of Kelly v. Alderson, 19 R. I. 544, 37 Atl. 12, is sometimes referred to as in conflict with these decisions, but the claim of the plaintiff was under the statute which obviated the necessity of proving the

scienter, and thus also saved the jury the necessity of weighing the "character of the dog against the plaintiff's oath." The same remark applies to East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

⁸⁸ Maggi v. Cutts, *supra*.

⁸⁹ Whitney v. Leominster, 136 Mass. 25.

same object has frightened other horses. This view has been urged on the ground that actual experiment of this character affords satisfactory, if not the most satisfactory, proof of the real issue to be tried. The opinion in a New Hampshire case⁹⁰ is a fine piece of sound reasoning, or, in other words, the common sense of the law admirably expressed. The learned judge who delivered it was impressed with the necessity of staying that trend toward the rejection of evidence on the stereotyped ground of its raising supposed collateral issues. He took the position boldly and forcibly that in such cases—practically of experiment already accomplished—such evidence was admissible. Where an action was against a town for a defect in a highway, and the alleged defect was a pile of lumber by the side of the road which frightened plaintiff's horse, evidence was offered to show that other horses were frightened in passing it, and the learned judge in holding the evidence admissible said: "If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses or wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to the evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of the law, why its ability to frighten horses should not be tested out of court, and proved in court in the same manner. When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to spec-

⁹⁰ *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

ulate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if anyone asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported?" Later on, in the same opinion, he says that the only rule relied upon to exclude experimental knowledge in such a case as this is the rule requiring the evidence to be confined to the issue. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge. "A fact as relevant," continued the learned judge, "and as directly involved in the issue of guilty or not guilty, between the parties, as any fact in controversy, was, the likelihood or probability of the lumber frightening ordinary horses. There was nothing collateral—that is, nothing irrelevant in that. To that point the fright of (the witness) Fletcher's horse was no more collateral than the fright of (the plaintiff) Darling's. And the combined fright of both horses was no more collateral, in a legal sense, than would be the combined results of any two experiments that could be tried to test the frightening power of the lumber. But the rule is sometimes inadvertently relied upon, in cases of this kind, where the plaintiff avers damage caused by the dangerous character of something for which the defendant was responsible, to admit the plaintiff's experience, on the occasion of his alleged injury, as competent evidence of the character of the thing complained of, and to exclude the experience of others equally relevant and equally material on that point. There are a few cases which go to

show, as matter of authority, that, on the question whether this pile of lumber was calculated to frighten horses, while the competency of the experiment with Darling's horse is not to be questioned, the experiment with Fletcher's is incompetent. The doctrine of those cases, applied to this case, would be founded on the error of taking it for granted that Darling's experiment is the point in issue, and holding Fletcher's to be collateral to Darling's, when the frightening power of the lumber is the point in issue; and, to that point, Fletcher's experience is no more collateral than Darling's and neither of them is collateral in a legal sense." It has been properly held that the competency of the evidence rests upon the same principle as evidence in actions against railroad corporations for damage by fire alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. A single instance would indeed be of little avail standing alone. A number of instances might afford satisfactory, if not demonstrative, evidence, and the inquiry in every such case is not whether the evidence offered is sufficient to prove the fact claimed, but whether it tends to prove it.⁹¹ As already referred to, on the other hand, and by another line of authorities, proof of this character

⁹¹ *Tomlinson v. Derby*, 43 Conn. 562; *Knight v. Goodyear Mfg. Co.*, 38 Conn. 438, 9 Am. Rep. 406; *House v. Metcalf*, 27 Conn. 631; *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L. R. A. 90, 50 Pac. 877; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Hill v. Portland & R. R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Bemis v. Temple*, 162 Mass. 342, 26 L. R. A. 254, 38 N. E. 970; *Nye v. Dibley*, 88 Minn. 465, 93 N. W. 524; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Champlin v. Penn Yan*, 34 Hun (N. Y.), 33; *Potter v. Natural*

Gas Co., 183 Pa. 575, 39 Atl. 7; *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643; *Bloor v. Delafield*, 69 Wis. 273, 34 N. W. 115; *Winona v. Botzet*, 169 Fed. 321, 23 L. R. A., N. S., 204, 94 C. C. A. 563. And it is equally relevant to show the result when the alleged cause has been removed: *Avery v. Burrall*, 118 Mich. 672, 77 N. W. 272; *Chase v. Blodgett Milling Co.*, 111 Wis. 655, 87 N. W. 826. See note to *Alcott v. Public Serv. Corp.*, 32 L. R. A., N. S., 1159; *Brown v. Eastern & M. R. Co.*, 22 Q. B. Div. 391.

is held to be excluded as collateral to the issue. It is open to the same objections as the form of proof already mentioned—that of other accidents at the same place; and our remarks on that subject apply with equal force to this. We think that the “collateral” suggestion has crept in insidiously and is strongly indicative of a desire to shirk the responsibility of dealing with a by no means difficult question. The authorities cited cannot be considered when the weight of the more modern reasoning is seen so greatly to preponderate.⁹² It must be borne in mind, however, in this connection, that with railroad corporations the emission of steam and smoke are the necessary accompaniment of the use of locomotive engines, and that it is only in exceptional cases where negligence can be imputed to railroad companies because horses on the highway are frightened by escaping steam, that such companies are liable. In the rapid growth of railroad law, evidenced by a vast accumulation of cases on almost every branch of it, and inter-distinguished by the finest demarcation, one is apt to lose sight of first principles and continue a discussion of differences from the last point of settlement, rather than settle each new point on its own basis, and thus one is sometimes induced to economize time at the expense of accuracy and thoroughness. This should not be. In considering the question—the liability of a railroad corporation for injuries due to the frightening of animals by the

⁹² *Cleveland Ry. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; *Bloor v. Delafield*, 69 Wis. 273, 34 N. W. 115. In *Darling v. Westmoreland*, *supra*, the court says: “The very few authorities, tending to sustain the exclusion of the fright of Fletcher’s horse in this case, are based upon the authority or the reason of the decision in *Collins v. Dorchester*, 6 Cush. (Mass.) 396, and two other Massachusetts cases which rest upon that case. . . . A consideration, substantially disposing of the very few

authorities that have any considerable tendency to sustain the ruling in this case, is, that *Collins v. Dorchester*, on which the others are based, is no authority for the exceptional doctrine it has been supposed to establish. That case being no foundation for the others, and they having no other foundation, they all fall together.” The two other cases referred to are *Aldrich v. Pelham*, 1 Gray (Mass.), 510, and *Kidder v. Dunstable*, 11 Gray (Mass.), 342.

emission of steam from engines—it must be looked at from the side of the corporation as to its rights and the side of the sufferers of injuries caused either to themselves, their decedent or their animals by reason of the latter taking alarm at the sound of escaping steam. The law, having sanctioned the operation of railroad trains, it must be presumed that the lawmakers knew that the running of those trains would cause noise both from the moving train and more especially from the steam whistles used both for challenging signals and for warnings, and, in addition, from the necessary blowing off of steam for safety from the valve or in other working of the engine. The safety of the public demands a recognition of their rights. There are those whose business lawfully takes them near the railroad either riding or in a vehicle drawn by horses, and lastly there are those who own animals at large which may roam near the railroad track. Taking those propositions together, it is to be considered how the railroad corporation shall safeguard the public without detriment to its own operations, and how the public shall contribute to that care by reasonably looking after its own safety. If the maxim to guide the public is “Stop, look and listen,” that for the railroad corporation should be, “Watch, ring and whistle,” each taking care that the direction is not extravagantly performed,⁹³ and each having in view those pecu-

⁹³ *Weller v. Lehigh Valley R. R. Co.*, 225 Pa. 110, 133 Am. St. Rep. 861, and note thereto, 24 L. R. A., N. S., 1202, 73 Atl. 1024. Whatever latitude may be allowed a railroad corporation running its engines in the open country, where slight want of care might be unaccompanied by injury to any, its liability for that want of care is immediately created when its operations bring them into populous neighborhoods and through them on grade crossings. The case of *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741, decides that a railroad company is bound to exer-

cise more caution and a higher degree of care when running its cars through a village or city, than in the open country. They have undoubtedly a right of way, but so have others; and while the duty of care cast on ordinary users of a way is equal, that of the one crossing it with a danger-bearing instrument or machine increases in proportion with its menace to the life, limb or property of the other. One of the latest utterances on the subject is to be found in *Williams v. Chicago B. & Q. R. Co.*, 78 Neb. 695, 14 L. R. A., N. S., 224, 111 N. W. 596, and it seems to embody

liarities and habits of animals which are matters of common knowledge.

§ 166 (163). Relevancy of disconnected facts to show defective machinery.—With the increased use of machinery and the proportionate increase of accidents, the law of the evidence to be adduced in support or contention of a claim has almost automatically adapted itself to the exigencies created by novel forms of negligence. Where the negligence complained of consists in the use by the defendant of machinery or other agencies alleged to be dangerous or unfit for use, it has frequently been found necessary to admit evidence of disconnected facts showing such unfitness or the capacity or tendency of the machine. Thus in an action for injuries, one of the questions was, whether the breaking of a pulley which injured the deceased was caused by the defendant's negligence. In order to sustain his action, it was necessary for the plaintiff to prove that it was. The evidence that the first pulley, which was "of the same form of construction and material, and used for the same purpose and in the same way," as the last one, broke a short time before the accident; that both pulleys were driven by a tight belt; and that the tightness of the belt and the danger of its breaking the shaft or pulley were

all that is contained in the principle already stated and to add that which makes it perfect. It emphasizes: 1. That ordinarily a railway company is not liable for injuries caused by horses taking fright at the noises incident to the ordinary operations of the engine; 2. That where the conditions are such that such noises would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noises, without materially interfering with the due operation of the train, it should be stayed or suspended until the danger is past; 3. That turning on the steam of an engine stand-

ing at a public street crossing without warning, and without taking due precaution to see whether anyone near the crossing is liable to be injured thereby is actionable negligence, in the absence of special circumstances justifying the act; and 4. That a train standing at a public crossing has no precedence over an ordinary traveler, their rights being equal. Each is bound to act with due regard to the other, and has a right to assume that the other will be controlled by such consideration as would influence the conduct of a man of ordinary care and prudence.

called to the attention of the defendants,—was admissible in connection with the other evidence. It tended to prove that the breaking of the pulley at the time of the accident was caused by a tight belt, and that the defendants were chargeable with notice of the defect and the danger likely to result from it.⁹⁴ Where injuries had been caused in an elevator accident, and there was evidence to sustain the contention that the sudden movements of the elevator at the time of the accident were caused by defective valves, and inasmuch as prior like movements of the elevator were evidence of the prior existence of leaky valves, testimony tending to establish such prior movements was competent, in order to show knowledge of the defect on the part of the defendant.⁹⁵ Where the injuries were caused to a man working between two machines and the electric lights went out and his arm was mangled in one of the machines, and the failure of the lights had frequently happened during the five years preceding the accident, the plaintiff being ignorant of it, the frequency and nature of the occurrences were proper to be submitted to the jury upon the question of notice to the defendants of the conditions which produced them.⁹⁶ The evidence to be relevant need not necessarily relate to the same machine,⁹⁷ but it is

⁹⁴ *Shute v. Exeter Mfg. Co.*, 69 N. H. 210, 40 Atl. 391; *Haseltine v. Concord R. R. Co.*, 64 N. H. 545, 15 Atl. 143; *Smith v. Boston etc. R. R. Co.*, 63 N. H. 25; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Boyce v. Cheshire R. R. Co.*, 43 N. H. 627; *Cooper v. Randall*, 59 Ill. 317 (where evidence of a mill throwing noxious matter on the premises of others than the plaintiff was improperly rejected, the court of appeal saying that as the issue was whether the offensive matter was deposited on plaintiff's house, the pertinency of the evidence was obvious and related to no collateral or incidental question).

⁹⁵ *Oregon Co. v. Roe*, 176 Fed. 715, 100 C. C. A. 269.

⁹⁶ *Rondeau v. Sayles (R. I.)*, 74 Atl. 785, 1009. See, also, *Odegard v. North Wisconsin Lumber Co.*, 130 Wis. 659, 110 N. W. 809, on the question of expert evidence as to how a machine worked at a date subsequent to the accident.

⁹⁷ *Alabama etc. R. Co. v. Yount*, 165 Ala. 537, 51 South. 737; *Blackman v. Collier*, 65 Ala. 312; *Louisville etc. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Birmingham Traction Co. v. Reville*, 136 Ala. 335, 34 South. 981; *Bauschka v. Western Coal etc. Co.*, 95 Ark. 477, 129 S. W. 1095; *Bowen v. Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010; *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687; *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 62,

absolutely essential that the conditions should present similar characteristics.⁹⁸

11 Ann. Cas. 111, 7 L. R. A., N. S., 1170, 86 Pac. 337; Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630; Holland v. Oil etc. Co., 134 Ga. 678, 68 S. E. 555; Kath v. East St. Louis etc. R. Co., 232 Ill. 126, 83 N. E. 533; Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Chicago etc. R. Co. v. Kinnare, 76 Ill. App. 394; Ashley Wire Co. v. Mercier, 163 Ill. 486, 45 N. E. 222; Beach v. Huntsman, 42 Ind. App. 205, 85 N. E. 523; Indiana etc. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175; National B. & L. Co. v. Dunn, 106 Ind. 110, 6 N. E. 131; Baber v. Rickart, 52 Ind. 594; Cahow v. Chicago etc. R. Co., 113 Iowa, 224, 84 N. W. 1056; Stoutenburgh v. Dow etc. Co., 82 Iowa, 179, 47 N. W. 1039; Keatley v. Illinois Cent. R. Co., 94 Iowa, 685, 63 N. W. 560; Kansas Pac. R. Co. v. Little, 19 Kan. 267; Wells v. Royer Wheel Co. (Ky.), 114 S. W. 737; Donovan v. Shawmut Co., 201 Mass. 357, 87 N. E. 580; Brierly v. Davol Mills, 128 Mass. 291; McMahon v. McHale, 174 Mass. 320, 54 N. E. 854; Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844; Casterton v. Blower Co., 142 Mich. 407, 106 N. W. 61; Avery v. Burrall, 118 Mich. 672, 77 N. W. 272; Rase v. Minneapolis, St. P. & S. S. M. R. Co., 107 Minn. 260, 21 L. R. A., N. S., 138, 120 N. W. 360; Doyle v. St. Paul etc. R. Co., 42 Minn. 79, 43 N. W. 787; Naughton v. Gaslight Co., 123 Mo. App. 192, 100 S. W. 1104; Scott v. Springfield, 81 Mo. App. 312; Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915; Soyer v. Great Falls Water Co., 15 Mont. 1, 37 Pac. 838; West v. Brevard Tanning Co., 154 N. C. 44, 69 S. E. 687; Shea v. Hedden Constr. Co., 107 N. Y. Supp. 54; Ballard v. Hitchcock Mfg.

Co., 71 Hun (N. Y.), 582, 24 N. Y. Supp. 1101; Turner v. Cochecho Mfg. Co., 75 N. H. 521, 77 Atl. 999; Shute v. Exeter Mfg. Co., 69 N. H. 210, 40 Atl. 391; Little v. Head etc. Co., 69 N. H. 494, 43 Atl. 619; Galvin v. Brown, 53 Or. 598, 101 Pac. 671; Houston v. Stamping Co., 38 Pa. Sup. Ct. 93; Carr v. American Locomotive Co., 29 R. I. 276, 10 Atl. 196; McGarrity v. New York etc. R. Co., 25 R. I. 269, 55 Atl. 718; Freeman v. Starr (Tex. Civ. App.), 138 S. W. 1150; Missouri Pac. R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838; Missouri etc. R. Co. v. McDuffey, 50 Tex. Civ. App. 202, 109 S. W. 1104; Galveston etc. R. Co. v. Jones, 29 Tex. Civ. App. 214, 68 S. W. 190; Sargent v. Fuel Co., 37 Utah, 392, 108 Pac. 928; Marshall v. Dalton Mills, 82 Vt. 489, 74 Atl. 108, 24 L. R. A., N. S., 128; Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102; Carpenter v. Cornith, 58 Vt. 214, 2 Atl. 170; Lane v. Bauserman, 103 Va. 146, 106 Am. St. Rep. 872, 48 S. E. 857; Barclay v. Puget Sound Lumber Co., 48 Wash. 241, 16 L. R. A., N. S., 140, 93 Pac. 430; Czarecki v. Seattle etc. R. etc. Co., 30 Wash. 288, 70 Pac. 750; Schweikert v. Lumber Co., 145 Wis. 632, 130 N. W. 508; Paine v. Eastern R. Co. of Minnesota, 91 Wis. 340, 64 N. W. 1005; Deninger v. American Locomotive Co., 185 Fed. 22; Ohio etc. Min. Co. v. Hutchings, 172 Fed. 201, 96 C. C. A. 653; Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336, 84 C. C. A. 232; Hammerschlag Mfg. Co. v. Struther-Wells Co., 154 Fed. 326, 83 C. C. A. 198; Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427; Canada-Kervin v. Mills Co., 28 Ont. 73.

⁹⁸ Jewell Filter Co. v. Kirk, 200 Ill. 382, 65 N. E. 698.

§ 166a (163). **Same—Railroad fires.**—The adaptation of the law to railroad environment has been often illustrated in cases against railroad companies for the *setting of fires* by means of *engines*, and the courts have been repeatedly called upon to consider the relevancy of evidence of other fires caused by the same engine on the same occasion as well as at other times, and of other fires caused by other engines of the same or similar construction. Since knowledge of the condition of such engines is confined for the most part to the agents of the company, it would often be difficult for the opposite party to prove their condition unless evidence of prior facts and circumstances should be received. Owing to the apparent necessities of the case, the courts seem to have somewhat relaxed the general rule, and they have in this class of cases received evidence that the same or other engines of similar construction on the same road had, before or after the accident in question, thrown out sparks or coals near the place in question. Where it is the same engine that is complained of as setting other fires on the same occasion either on the ground of defective management or construction, the evidence of such other fires is relevant. In a frequently cited Iowa case⁹⁹ it was held a correct instruction, that if from the evidence the jury found that defendant's engine set out the fire alleged, and also that the same engine set out several successive fires on the same trip and on the same day, then the fact of the repeated setting out of such fires will be evidence tending to show that defendant's engine was not properly constructed as to its appliances for prevention of escape of fire, or that the same was not properly used at the time, or that it was not in repair, and as such must be considered by them in making up their verdict and in determining as to whether or not the fire occurred through the fault or negligence of the defendant or its employees. This instruction contains the law of to-day and has found support in a number of cases both when the fires could be

⁹⁹ Slossen v. Burlington C. R. & N. Y. Co., 60 Iowa, 215, 14 N. W. 244.

directly charged to the engine in question and where they were seen to rise shortly after its passing.¹⁰⁰

¹⁰⁰ *Southern Co. v. Darwin*, 156 Ala. 311, 130 Am. St. Rep. 94, 47 South. 314; *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 South. 917, 145 Ala. 459, 39 South. 816; *Central Arkansas etc. R. Co. v. Goelzer*, 92 Ark. 569, 123 S. W. 781; *Butcher v. Vaca Valley etc. R. Co.*, 67 Cal. 518, 8 Pac. 174; *Jacksonville etc. R. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1, 157, 17 L. R. A. 33, 65, 9 South. 661; *Georgia etc. R. Co. v. Summer*, 133 Ga. 134, 65 S. E. 381; *Hendricks v. Southern R. Co.*, 123 Ga. 342, 51 S. E. 415; *Akins v. Georgia R. etc. Co.*, 111 Ga. 815, 35 S. E. 671; *Baltimore etc. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833; *Louisville & N. R. Co. v. Vinyard*, 39 Ind. App. 628, 79 N. E. 384; *Lake Erie & W. R. Co. v. Gould*, 18 Ind. App. 275, 47 N. E. 941; *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033; *Chicago etc. R. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451; *Evansville etc. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *Tyler v. Chicago & N. W. R. Co.*, 102 Iowa, 632, 71 N. W. 536; *Slossen v. Burlington C. R. & N. R. Co.*, 60 Iowa, 214, 10 N. W. 860, 14 N. W. 244; *Lanning v. Chicago B. & Q. R. Co.*, 68 Iowa, 502, 27 N. W. 478; *Bell v. Chicago B. & Q. R. Co.*, 64 Iowa, 321, 20 N. W. 456; *Babcock v. Chicago & N. W. R. Co.*, 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909; *Taylor v. Louisville etc. R. Co.*, 19 Ky. Law Rep. 717, 41 S. W. 551; *Baltimore etc. R. Co. v. Woodruff*, 4 Md. 242, 59 Am. Dec. 72; *Loring v. Worcester etc. R. Co.*, 131 Mass. 469; *Ross v. Boston etc. R. Co.*, 6 Allen (Mass.), 87; *Patton v. St. Louis & S. F. R. Co.*, 87 Mo. 117, 56 Am. Rep. 446; *Kenney v. Hannibal & St.*

J. R. Co., 70 Mo. 243; *Haseltine v. Concord R. R.*, 64 N. H. 545, 15 Atl. 143; *Babbitt v. Erie R. Co.*, 108 App. Div. 74, 95 N. Y. Supp. 429; *Jacobs v. New York Cent. etc. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389; *Whitehurst v. Atlantic Coast Line R. Co.*, 146 N. C. 588, 60 S. E. 648; *Knott v. Cape Fear etc. R. Co.*, 142 N. C. 238, 55 S. E. 150; *Johnson v. Atlantic Coast Line R. Co.*, 140 N. C. 574, 581, 53 S. E. 362; *Mellinger v. Pennsylvania R. Co.*, 229 Pa. 122, 78 Atl. 66; *Henderson v. Philadelphia etc. R. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Pennsylvania R. Co. v. Watson (Pa.)*, 33 Leg. Int. 329; *Smith v. Chicago etc. R. Co.*, 4 S. D. 71, 55 N. W. 717; *Missouri etc. R. Co. v. Miller (Tex. Civ. App.)*, 110 S. W. 549; *Missouri etc. R. Co. v. Pfluger (Tex. Civ. App. 1894)*, 25 S. W. 792; *Fleming v. Pullen (Tex. Civ. App. 1906)*, 97 S. W. 109; *McFarland v. Gulf etc. R. Co. (Tex. Civ. App. 1905)*, 88 S. W. 450; *Texas & Pac. R. Co. v. Scottish Union Nat. Ins. Co.*, 32 Tex. Civ. App. 82, 73 S. W. 1088; *Norfolk etc. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521; *Allen v. Chicago etc. R. Co.*, 145 Wis. 263, 129 N. W. 1094; *Menominee River Sash etc. Co. v. Milwaukee etc. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Brusberg v. Milwaukee L. S. & W. R. Co.*, 55 Wis. 106, 12 N. W. 416; *Texas & Pac. R. Co. v. Watson*, 190 U. S. 287, 23 Sup. Ct. Rep. 681; *Grand Trunk R. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Toledo etc. R. Co. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 208.

§ 166b (163). **Same — Other fires caused by same engine.**—In an action for loss by fire caused by sparks from the locomotive engine of a railroad company, negligence on the part of the company is the gist of the action and the burden of proof is upon the plaintiff to prove it. The mere fact of the existence of the fire will not charge the company with either negligence or want of skill. In case of loss by fire, fairly attributable to sparks from a railroad company's locomotive, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company; and although the emission of sparks is not of itself evidence of negligence, the fact that they cause a fire at a considerable distance raises the presumption that the engine is not provided with a sufficient spark-arrester. Where a railroad fire complained of is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine, which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation; and evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. The evidence must also be confined to the operation of the identified engine at or about the time of the occurrence of the fire. Of course the inquiry in all such cases is as to the existence or condition of the spark-arrester at the precise time of the injury; but in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence. Thus, it was correctly shown that every day for two weeks a particular engine had been observed to throw out quantities of unusually large sparks, and had fired property along the line of the railroad,¹ and in another case where it was proved the fire was communicated by one

¹ *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. 344.

of two engines, it was competent to show that both engines then in question had done this for some time before the occurrence.² Testimony tending to show that other fires were set by the same engine about the same time, however, is admitted according to the proper rule, and is undoubtedly competent.³

§ 166c (163). Same—Fires caused by other engines.—

It is so difficult, in the nature of the case, for a plaintiff whose property has been destroyed by fire set out by a railroad engine, to obtain direct evidence of defects in the construction, or of negligence in the management of the particular engine which caused the damage, that courts have trenched somewhat upon the general rules regarding the relevancy of evidence in actions of this kind. It is generally held, that in actions for damages from fires caused by sparks from locomotives, the plaintiff may introduce evidence to show that about the time the fire in question happened, the engines of the defendant running past

² *Albert v. Northern Cent. Ry. Co.*, 98 Pa. 316; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644.

³ *Farley v. Mobile etc. R. Co.*, 149 Ala. 557, 42 South. 747; *Birmingham etc. Co. v. Martin*, 148 Ala. 8, 42 South. 618; *Central etc. R. Co. v. Goelzer*, 92 Ark. 569, 123 S. W. 781; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Jacksonville T. & K. W. R. Co. v. Peninsular L. T. Mfg. Co.*, 27 Fla. 1, 157, 17 L. R. A. 33, 9 South. 661; *Georgia etc. R. Co. v. Summer*, 133 Ga. 134, 65 S. E. 381; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833; *Lake Erie etc. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660; *Missouri K. & T. R. Co. v. Wilder*, 3 Ind. Ter. 85, 53 S. W. 490; *Cincinnati etc. R. Co. v. Cecil*, 28 Ky. Law Rep. 830, 90 S. W. 585; *Ainsworth v. Hover*, 162 Mich. 135, 127 N. W. 325; *Ireland v. Cincinnati W. & M. R. Co.*, 79 Mich. 163, 44 N. W.

426; *Nelson v. Chicago M. & St. P. R. Co.*, 35 Minn. 170, 28 N. W. 215; *Boyce v. Cheshire R. R. Co.*, 43 N. H. 627; *Whitehurst v. Atlantic etc. R. Co.*, 146 N. C. 588, 60 S. E. 648; *Knott v. Cape Fear etc. R. Co.*, 142 N. C. 238, 55 S. E. 150; *Cheek v. Oak Grove Lumber Co.*, 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; *Henderson v. Philadelphia & R. R. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *St. Louis S. R. Co. v. Eccles*, 53 Tex. Civ. 125, 115 S. W. 648; *Fleming v. Pullen* (Tex. Civ. App.), 97 S. W. 109; *Missouri etc. R. Co. v. Pflugger* (Tex. Civ. App.), 25 S. W. 792; *Patteson v. Chesapeake & O. R. Co.*, 94 Va. 16, 26 S. E. 393; *New York P. & N. R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Menominee R. S. & D. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

the location of the fire were in such a condition, or were so managed, as to be likely to set fire to objects in the position of the property burned, or that sparks were emitted by other engines of the company about that time, and set fire to other property similarly situated, without showing that these engines were run by the same engineers, or were of the same construction as the one that occasioned the damage. There is practically no conflict remaining on the point that evidence of other fires by other locomotives is relevant on the issues of negligence and the cause of the fire complained of, and this, too, without identification of the engines. Whatever little contrary opinion existed has been entirely occluded since the opinion of Mr. Justice Strong.⁴ In that case testimony was introduced by the plaintiff that some of the company's locomotives scattered fire at various times during the same summer before the fire, when passing the sawmill, without showing that either of the two which the plaintiff claimed to have communicated the fire in question was among the number; and also without showing that either was similar in construction, state of repair or management to those which scattered fire as aforesaid. It was claimed that in order to have rendered the testimony admissible, it should have been confined to the same engines, operated in the same manner and in the same state of repair, or to other engines proved to have been of the same construction, used in the same manner and in the same state of repair. The opinion referred to says: "The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiff's case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property were caused by any of the defendant's locomotives. The question has often been considered

⁴ *Grand Trunk Railway Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

by the courts in this country and in England; and such evidence has, we think, been generally admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company.⁵ There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage."⁶

⁵ *Chicago etc. R. Co. v. Williams*, 44 Ill. 176; *Longabaugh v. Virginia City etc. R. Co.*, 9 Nev. 271; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155; *Field v. New York etc. R. R. Co.*, 32 N. Y. 339; *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389; *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22; *Cleaveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Piggott v. R. R. Co.*, 3 Man. G. & S. 229.

⁶ *Grand Trunk Railroad Co. v. Richardson*, *supra*, has been cited with approval in *Alabama etc. R. R. v. Moody*, 92 Ala. 284, 9 South. 240; *Colorado Mortgage Co. v. Rees*, 21 Colo. 441, 42 Pac. 44; *Brown v. Benson*, 101 Ga. 758, 29 S. E. 217; *Baltimore etc. Ry. Co. v. Tripp*, 175 Ill. 259, 51 N. E. 835; *Evansville etc. R. R. v. Keith*, 8 Ind. App. 64, 35 N. E. 298; *Delphi v. Lowery*, 74 Ind. 524, 39 Am. Rep. 99; *Dunning v. Maine etc. R. R.*, 91 Me. 99, 64 Am. St. Rep. 212, 39 Atl. 356; *Thatcher v. Maine etc. R. R.*, 85 Me. 509, 27 Atl. 522; *Crocker v. McGregor*, 76 Me. 284, 49 Am. Rep. 612;

Shea v. Glendale etc. Fabrics Co., 162 Mass. 465, 38 N. E. 1124; *Campbell v. Missouri etc. Ry.*, 121 Mo. 350, 42 Am. St. Rep. 535, 25 L. R. A. 177, 25 S. W. 938; *Diamond v. Northern etc. R. R.*, 6 Mont. 584, 13 Pac. 369; *Hastine v. Concord R. R.*, 64 N. H. 546, 15 Atl. 144; *Union Pacific Ry. v. Keller*, 36 Neb. 189, 54 N. W. 422; *Watt v. Nevada etc. R. R.*, 23 Nev. 165, 62 Am. St. Rep. 776, 44 Pac. 425, 46 Pac. 52, 726; *Hall v. Brown*, 58 N. H. 98; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 114; *Koontz v. O. R. & N. Co.*, 20 Or. 18, 23 Pac. 824; *Henderson v. Philadelphia etc. R. R.*, 144 Pa. 479, 27 Am. St. Rep. 657, 16 L. R. A. 299, 22 Atl. 853; *Bennett v. Missouri etc. Ry.*, 11 Tex. Civ. App. 427, 32 S. W. 835; *International etc. Ry. v. Kuehn*, 2 Tex. Civ. App. 219, 21 S. W. 62; *Gulf C. & S. F. Ry. v. Holt*, 1 Tex. App. Civ. 480; *Missouri etc. Ry. v. Donaldson*, 73 Tex. 127, 11 S. W. 164; *Texas etc. Ry. v. De Milley*, 60 Tex. 198; *New York etc. R. R. v. Thomas*, 92 Va. 612, 24 S. E. 266;

The evidence which has been so held relevant is not limited in its nature, every latitude being allowed to the plaintiff to produce testimony of the passing of the engines, the sparks and cinders emitted, the escape of coals, in short every circumstance which may tend to prove the possibility that the fire was communicated to the plaintiff's property from one of the defendant's engines.⁷ After the

Brighthope Ry. Co. v. Rogers, 76 Va. 449; *Snyder v. Pittsburgh etc. Ry.*, 11 W. Va. 41; *Toledo etc. R. Co. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 208; *Central etc. R. v. Ruggles*, 75 Fed. 956, 21 C. C. A. 575, 33 U. S. App. 567; *Central etc. R. R. v. Soper*, 59 Fed. 890, 8 C. C. A. 341, 21 U. S. App. 24; *Gulf etc. Ry. v. Johnson*, 54 Fed. 476, 4 C. C. A. 447, 10 U. S. App. 629; *Chicago etc. Ry. v. Gilbert*, 52 Fed. 712, 3 C. C. A. 264, 10 U. S. App. 375; *Northern etc. R. Co. v. Lewis*, 51 Fed. 664, 2 C. C. A. 446, 7 U. S. App. 254.

⁷ *Birmingham etc. Co. v. Martin*, 148 Ala. 8, 42 South. 618; *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 South. 917; *McMahon v. Hetch-Hetchy etc. R. Co.*, 2 Cal. App. 400, 84 Pac. 350; *Florida etc. R. Co. v. Welch*, 53 Fla. 145, 12 Ann. Cas. 210, 44 South. 250; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *Lake Erie etc. R. Co. v. Kirts*, 29 Ill. App. 175; *Lake Erie & W. R. Co. v. Cruzen*, 29 Ill. App. 212; *Louisville N. A. & C. R. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609; *Evansville etc. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *St. Louis etc. R. Co. v. Lawrence*, 4 Ind. Ter. 611, 76 S. W. 254; *Black v. Minneapolis etc. R. Co.*, 122 Iowa, 32, 96 N. W. 984; *Sprague v. Atchison, T. & S. F. R. Co.*, 70 Kan. 359, 78 Pac. 828; *Illinois C. R. Co. v. Hicklin*, 131 Ky. 624, 23 L. R. A., N. S., 870, 115 S. W. 752; *Chesapeake & O. R. Co. v. Richardson*, 30 Ky. Law Rep.

786, 99 S. W. 642; *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165, 5 Ky. Law Rep. 518; *Louisville & N. R. Co. v. Samuels*, 22 Ky. Law Rep. 303, 57 S. W. 235; *Louisville & N. R. Co. v. Dalton*, 102 Ky. 290, 43 S. W. 431; *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165; *Illinois Cent. R. Co. v. Scheible*, 24 Ky. Law Rep. 1708, 72 S. W. 325; *Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352; *Thatcher v. Maine Cent. R. Co.*, 85 Me. 502, 27 Atl. 519; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 135; *Bowen v. Boston etc. R. Co.*, 179 Mass. 524, 61 N. E. 141; *Alabama & V. R. Co. v. Aetna Ins. Co.*, 82 Miss. 770, 35 South. 304; *Big River L. Co. v. St. Louis etc. R. Co.*, 123 Mo. App. 394, 101 S. W. 636; *Gibbs v. St. L. & S. F. R. Co.*, 104 Mo. App. 276, 78 S. W. 835; *Hoover v. Missouri P. R. Co. (Md.)*, 16 S. W. 480; *Patton v. St. Louis etc. R. Co.*, 87 Mo. 117, 56 Am. Rep. 446; *Campbell v. Missouri Pac. R. Co.*, 121 Mo. 340, 42 Am. St. Rep. 530, 25 S. W. 936; *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645, 44 S. W. 802; *Haley v. St. Louis etc. R. Co.*, 69 Mo. 614; *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 13 Pac. 367; *Abbott v. Chicago etc. R. Co.*, 88 Neb. 727, 130 N. W. 438; *Longabaugh v. Virginia City etc. R. Co.*, 9 Nev. 271; *Boyce v. Cheshire R. Co.*, 42 N. H. 97, 43 N. H. 627; *Goodman v. Lehigh Valley R. Co.*, 78 N. J. L. 317, 74 Atl. 519; *Higgins v. Long Island*

plaintiff has refuted other probable causes, evidence that engines were so managed near the location of the fire as to be likely to set on fire objects not more remote than the property burned not only renders it probable that the fire was set by the defendant's engine, but raises an inference that there was something improper in the construction or management of the engine which caused the fire.⁸ But the presumption in such case is only *prima facie*, not conclusive, and is of course subject to rebuttal by competent evidence.⁹

R. Co., 129 App. Div. 415, 114 N. Y. Supp. 262; *Jacobs v. New York Cent. etc. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954; *Crist v. Erie R. Co.*, 58 N. Y. 638; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.), 182; *Whitehurst v. Atlantic etc. R. Co.*, 146 N. C. 588, 60 S. E. 648; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 111, 7 Ohio Cir. Dec. 119; *Manchester Assur. Co. v. Oregon R. & N. Co.*, 46 Or. 162, 114 Am. St. Rep. 863, 69 L. R. A. 475, 79 Pac. 60; *Koontz v. Oregon Nav. etc. Co.*, 20 Or. 3, 23 Pac. 820; *Shelly v. Philadelphia etc. R. Co.*, 211 Pa. 160, 60 Atl. 581; *Henderson v. Philadelphia etc. R. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405; *Gorham Mfg. Co. v. New York etc. R. Co.*, 27 R. I. 35, 60 Atl. 638; *MacDonald v. New York N. H. & H. R. Co.*, 25 R. I. 40, 54 Atl. 795; *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22; *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429; *Louisville etc. R. Co. v. Short*, 110 Tenn. 713, 77 S. W. 936; *Burke v. Louisville etc. R. Co.*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Texas & P. R. Co. v. Owen* (Tex. Civ.), 128 S. W. 1139; *Morgan v. Missouri etc. R. Co.*, 50 Tex. Civ. 420, 110 S. W. 978; *Missouri etc. R. Co. v.*

Carter, 95 Tex. 461, 68 S. W. 159; *Galveston H. & S. A. R. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294; *Huntley v. Rutland R. Co.*, 83 Vt. 180, 74 Atl. 1000; *Smith v. Central Vermont R. Co.*, 80 Vt. 208, 67 Atl. 535; *Ide v. Boston etc. R. Co.*, 83 Vt. 66, 74 Atl. 401; *Hoskinson v. Central Vermont R. Co.*, 66 Vt. 618, 30 Atl. 24; *Norfolk etc. R. Co. v. Thomas*, 110 Va. 622, 66 S. E. 817; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *Noland v. Great Northern R. Co.*, 31 Wash. 430, 71 Pac. 1098; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 464, 23 L. Ed. 356; *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446; *Piggott v. Eastern Counties R. Co.*, 3 Man. G. & S. 229, 54 Eng. Com. L. 228.

⁸ *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 218, 67 Am. Dec. 155, and note; *Henderson v. Philadelphia & R. Ry. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502, 27 Atl. 519.

⁹ *Chicago & A. Ry. Co. v. Quaintance*, 58 Ill. 389; *Toledo W. & W. Ry. Co. v. Larmon*, 67 Ill. 68; *Kenney v. Hannibal & St. J. Ry. Co.*, 70 Mo. 242; *Libby v. Chicago R. I. & P. Ry. Co.*, 52 Iowa, 92, 2 N. W. 982.

§ 167 (164). **Same, continued.**—The view has been maintained by very high authority that this evidence may be allowed without any proof of *similarity in construction* of the engines. This view rests on the theory that the business of running trains on a railroad presupposes a unity of management and a general similarity of the engines, and that the evidence in question tends to show a negligent habit of the officers and agents of the corporation.¹⁰ The leading case has been criticised and has stood the test of criticism; and the rule held in some jurisdictions, that testimony of the character under discussion should be rejected where the specific engine claimed to have done the damage is known and identified,¹¹ does not clash with it in any respect. Where the specific engine is identified, it is only common sense that the vagaries of other engines should not control the liability for the one which the plaintiff claims is the cause of his damage. The leading case attempts to announce no more, no less than this, and the attack upon it by Orton, J., for want of logic,¹² seems to us as illogical as it is ill-founded. In addition it contains its own refutation. The learned judge who wrote it says: "In cases where it is shown either by positive or circumstantial evidence, that some locomotive of the company caused the fire, without the identification of any particular one, such evidence might have weight in showing the negligence of the

¹⁰ *Dunning v. Railway Co.*, 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502, 27 Atl. 519; *Matthews v. Railway Co.*, 142 Mo. 645, 44 S. W. 802; *Longabaugh v. Virginia City etc. R. Co.*, 9 Nev. 271; *Webb v. Rome etc. Ry. Co.*, 49 N. Y. 420, 10 Am. Rep. 389, and note; *Field v. New York etc. R. R. Co.*, 32 N. Y. 339; *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 218, 67 Am. Dec. 155; *Koontz v. Railway Co.*, 20 Or. 3, 23 Pac. 820. As to general subject, see note, 38 Am. Dec. 70; *Koontz v. Railway Co.*, 20 Or. 3, 23 Pac. 820; *Hoskison v.*

Railway Co., 66 Vt. 618, 30 Atl. 24; *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

¹¹ *Henderson v. Philadelphia Ry. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Noland v. Railway Co.*, 31 Wash. 430, 71 Pac. 1098; *Lesser Cotton Co. v. St. Louis etc. Ry. Co.*, 114 Fed. 133, 52 C. C. A. 95; *St. Louis I. M. & S. R. Co. v. Lawrence*, 4 Ind. Ter. 611, 76 S. W. 254; *Gibbons v. Wisconsin Valley Road*, 58 Wis. 335, 17 N. W. 132.

¹² *Gibbons v. Wisconsin Valley Road*, *supra*.

company. There may be cases which have gone further than this in the admission of such evidence, but they do not appear to us authority in reason."¹³ Of course the other facts relied on in such cases must not be so remote in time or place as not to lead to a fair inference that the same conditions still exist at the time and place under inquiry. But it has been held proper to receive such evidence as to former fires happening a considerable time before that in question, although it will be found there is always a good reason for so doing.¹⁴ It is not competent,

¹³ The opinion above referred to contains the following which is surely all that is claimed for the leading case. In *Ross v. Boston etc. R. Co.*, 6 Allen (Mass.), 87, it was held competent to show that the *engine in question* emitted burning sparks a fortnight previous to the fire in question, and that other similarly constructed engines had emitted sparks which set fires. Where there is no proof of what particular engine set the fire, and the circumstantial evidence is such that there is a strong probability that some engine on the road did set the fire, then it may be proper to show that the engines on that road generally emitted sparks, or that some one or more of them did so at other times and places: *Sheldon v. Hudson River R. Co.*, 14 N. Y. 221, 67 Am. Dec. 155; *Field v. New York etc. R. Co.*, 32 N. Y. 339; *St. Joseph etc. R. Co. v. Chase*, 11 Kan. 47; *Huyett v. Philadelphia etc. R. Co.*, 23 Pa. 373; 1 Thomp. Neg. Notes, 160. Testimony showing that some of the company's locomotives had previously or subsequently scattered fire is not admissible unless it is also shown that the locomotive which caused the fire was one of them, or was similar in construction, state of repair, or management: *Boyce v. Cheshire R. Co.*, 42 N. H. 97; *Phelps v. Conant*, 30 Vt. 277;

Malton v. Nesbit, 1 Car. & P. 70; *Hubbard v. Androscoggin etc. R. Co.*, 39 Me. 506; *Standish v. Washburn*, 21 Pick. (Mass.) 237; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Robinson v. Fitchburg etc. R. Co.*, 7 Gray (Mass.), 92; *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *Sheldon v. Railroad, supra*; *Smith v. Hannibal etc. R. Co.*, 37 Mo. 287; *Lackawanna etc. R. Co. v. Doak*, 52 Pa. 379, 91 Am. Dec. 166.

¹⁴ *Louisville etc. R. Co. v. Miller*, 109 Ala. 500, 19 South. 989; *St. Louis etc. R. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595; *Steele v. Pacific Coast R. Co.*, 74 Cal. 323, 15 Pac. 851; *Brown v. Benson*, 101 Ga. 753, 29 S. E. 215; *Babcock v. Chicago etc. R. Co.*, 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909; *Stowe v. Louisville R. Co.*, 140 Ky. 291, 131 S. W. 4; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502, 27 Atl. 519; *Sims v. American Ice Co.*, 109 Md. 68, 71 Atl. 522; *Davidson v. St. Paul etc. R. Co.*, 34 Minn. 51, 24 N. W. 324; *Longabaugh v. Virginia City etc. Ry. Co.*, 9 Nev. 271; *Collins v. New York Cent. & H. R. R. Co.*, 109 N. Y. 243, 16 N. E. 50; *Field v. New York Cent. Ry. Co.*, 32 N. Y. 339; *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 221, 67 Am. Dec. 155, and note; *Johnson v. Atlantic Coast Line R. Co.*, 140 N. C. 574, 53 S. E. 362;

however, to show that defendant had settled claims for fires claimed to have been caused by defendant's engines. A defendant has a right to settle a claim of damages alleged to have been caused by fire, without admitting that it was responsible for such fire.¹⁵

§ 168 (165). Facts apparently collateral—Value of lands.—Whenever the question of value is involved, it is apparent that in the necessary comparison, there is great danger of facts which do not point to the issue being introduced. Value, even intrinsic value, must always be measured by a standard, and when the value of lands is the subject of ascertainment, there are so many different matters which may enter into the consideration, that the exclusion of that which is not relevant becomes a difficult task. To make the comparison, it is necessary to tabulate those circumstances connected with the land itself, its locality, its improvement, its capacity for production either of vegetable or mineral matter, its cost to the owner, its rental value, its natural and artificial advantages, until, having formed the proper idea of the use to which it may most advantageously be turned, the time arrives as to what its value is, not so much to the owner as to others, and what others in like circumstances have obtained for theirs. Hence the question has frequently arisen in the courts whether the values of lands can be shown by testimony as to actual sales of other lands in the neighborhood. It is very clear that the value of land may be shown by proving the market value,¹⁶ and that the knowledge of the wit-

Cheek v. Oak Grove Lumb. Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; *Hawley v. Sumpter R. Co.*, 49 Or. 509, 12 L. R. A., N. S., 526, 90 Pac. 1106; *John Hancock Ice Co. v. Perkiomen R. Co.*, 224 Pa. 74, 73 Atl. 194; *Henderson v. Philadelphia Ry. Co.*, 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *McGill Bros. v. Seaboard etc. R. Co.*, 87 S. C. 178, 69 S. E. 156; *Galveston H. & S. A. R.*

Co. v. Rheiner (Tex. Civ. App.), 25 S. W. 971; *Missouri Pac. R. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163; *Menominee R. S. & D. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Chicago etc. Ry. Co. v. Kendall*, 186 Fed. 139.

¹⁵ *Chicago etc. Ry. Co. v. Kendall*, *supra*.

¹⁶ The sum to be awarded for real estate taken is the fair market value

ness as to such market value may be based upon his knowledge of *other sales*. And it is generally held that when a witness testifies as to the value of land he may be cross-examined to test his knowledge and credibility as to other sales under similar conditions.¹⁷ But it is urged

of the property, having reference to all the uses to which it is adapted. Its value for any special purpose is not the test, although it may be considered, with a view of ascertaining what the property is worth in the market for any use for which it would bring the most: *Conness v. Commonwealth*, 184 Mass. 541, 69 N. E. 341; *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610, and a long line of Massachusetts cases from *Moulton v. Newburyport Water Co.*, 137 Mass. 163, to *Butchers' Assn. v. Commonwealth*, 169 Mass. 103, 47 N. E. 599. The market value of property is made up on a great many items—its productiveness, its pleasantness, its nearness to markets, mills, etc: *Stafford v. City of Providence*, 10 R. I. 567, 14 Am. Rep. 710. The question is not, What estimate does the owner place upon it? But, what is its real worth, in the judgment of honest, competent, and disinterested men? The use to which the owner has applied his property is of no importance beyond its influence upon the present value. If highly cultivated, it will be worth more than though it had been suffered to run to waste. In *Re Furman St.*, 17 Wend. (N. Y.) 649, the court said at page 670: "I cannot yield to the argument that the commissioners were bound to regard only the use to which the property is now applied, and pay the appellant a sufficient sum of money to secure him in that mode of enjoyment for the future. They might properly take into consideration the more advantageous use to which the property

may be applied in consequence of opening the new street. In a case like this the proper mode of adjusting the question of damages is to inquire what is the present value of the land, and what it will be worth when the contemplated work is completed. In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner, in relation to its future enjoyment, can be a matter of much importance. In both cases the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied." See *Milwaukee Trust Co. v. City of Milwaukee* (Wis.), 138 N. W. 707, where the court says the difficulty of ascertaining "value" and "market value" is met by the court's adopting as the equivalent of the phrase "market value," what "the property is worth or will sell for as between one who wants to purchase and one who wants to sell." See *Esch v. Chicago etc. R. Co.*, 72 Wis. 229, 39 N. W. 129.

¹⁷ *Ladd v. Ladd*, 121 Ala. 583, 25 South. 627; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Davis v. Northwestern El. R. Co.*, 170 Ill. 595, 48 N. E. 1058; *Union R. T. & S. Y. Co. v. Moore*, 80 Ind. 458; *Kansas City etc. E. Co. v. Weidenmann*, 77 Kan. 300, 94 Pac. 146; *Kansas C. & T. R. Co. v. Vickroy*, 46 Kan. 248, 26 Pac. 698; *Board of Levee Commrs. v. Nelms*, 82 Miss. 416, 34 South. 149; *Board v. Dilard*, 76 Miss. 641, 25 South. 292; *St. Louis etc. R. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *Union Pac. R. Co. v. Stanwood*, 71 Neb. 150, 91 N. W.

that direct proof of other sales and of the prices paid gives to the agreements of such third parties the effect of evidence, without giving any opportunity for cross-examination to show that the price paid was inadequate or excessive. It is also objected that the reception of such evidence would lead to many *collateral issues* for which the respective parties could not be prepared. For these and other reasons, it has been held in some states that the values of land cannot be thus shown on direct examination by evidence as to particular sales of similar tracts;¹⁸ but an entirely different rule is maintained in other states.¹⁹ In those jurisdictions where such evidence

191, 98 N. W. 656; Chicago etc. R. Co. v. Griffith, 44 Neb. 690, 62 N. W. 868; East Pa. R. Co. v. Hiester, 40 Pa. 53; Uniacke v. Chicago etc. R. Co., 67 Wis. 108, 29 N. W. 899; Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

¹⁸ Central Pac. R. Co. v. Pearson, 35 Cal. 247; Selma etc. R. Co. v. Keith, 53 Ga. 178; Stinson v. Railway Co., 27 Minn. 284, 6 N. W. 784; Montclair R. Co. v. Benson, 36 N. J. L. 557; Robinson v. New York etc. Railway Co., 175 N. Y. 219, 67 N. E. 431; In re Thompson, 127 N. Y. 463, 14 L. R. A. 52, 28 N. E. 389; Union Pac. R. Co. v. Stanwood, 71 Neb. 150, 91 N. W. 191, 98 N. W. 656; Oregon R. etc. Co. v. Eastlack, 54 Or. 196, 102 Pac. 1011; Neely v. Western Allegheny R. Co., 219 Pa. 349, 68 Atl. 829 (what the plaintiff himself paid for other lands is not admissible); Gorgas v. Philadelphia etc. R. Co., 215 Pa. 501, 114 Am. St. Rep. 974, 64 Atl. 680; Pennsylvania Schuylkill Valley R. Co. v. Ziemer, 124 Pa. 560, 17 Atl. 187; Pittsburgh etc. R. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Pittsburgh etc. R. Co. v. Patterson, 107 Pa. 461; Pennsylvania etc. R. etc. Co. v. Bunnell, 81 Pa. 414; East Pennsylvania R. Co. v. Hiester, 40 Pa. 53.

¹⁹ Tennessee Coal etc. Co. v. State, 141 Ala. 103, 37 South. 433; West Stokie Drainage Dist. v. Dawson, 243 Ill. 175, 17 Ann. Cas. 776, 90 N. E. 377; Commissioners v. Ayer, 237 Ill. 211, 86 N. E. 704; Eldorado etc. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281; Chicago etc. R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088, 104 Ill. App. 507; Culbertson etc. Packing Co. v. Chicago, 111 Ill. 651; Chicago Ry. Co. v. Maroney, 95 Ill. 179; Richardson v. Webster City, 111 Iowa, 427, 82 N. W. 920; Cherokee v. Sioux City etc. Town Lot etc. Co., 52 Iowa, 279, 3 N. W. 42; Louisville etc. R. Co. v. Whipps, 118 Ky. 121, 25 Ky. Law Rep. 2312, 4 Ann. Cas. 996, 80 S. W. 507; Chicago etc. R. Co. v. Rottgering, 26 Ky. Law Rep. 1167, 83 S. W. 584; Paducah v. Allen, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981; New Orleans v. Manfre, 111 La. 927, 35 South. 981; Norton v. Willis, 73 Me. 580; Baltimore v. Smith etc. Brick Co., 80 Md. 458, 31 Atl. 423; O'Malley v. Commonwealth, 182 Mass. 196, 65 N. E. 30; Teele v. Boston, 165 Mass. 88, 42 N. E. 506; Armory v. Melrose, 162 Mass. 556, 39 N. E. 276; Hunt v. Boston, 152 Mass. 168, 25 N.

is admitted, the courts are agreed that the proof of other sales must be limited to those *in the vicinity*. In determining this question, however, the nature of the land must be taken into consideration. If the lands are thinly settled or used for agricultural purposes, it might be proper to receive evidence of the sales of other lands several miles away; while if the lands were city lots, a distance of several blocks might render the evidence improper.²⁰ It is equally clear that evidence of other sales should not be received if it appear that they were *too remote in point*

E. 82; *Sawyer v. Boston*, 144 Mass. 470, 11 N. E. 711; *Metropolitan R. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860; *Matter of Forsyth Boulevard*, 127 Mo. 417, 30 S. W. 188; *St. Louis etc. R. Co. v. Clark*, 121 Mo. 169, 26 L. R. A. 751, 25 S. W. 192, 906; *Stevens v. Springer*, 23 Mo. App. 375; *Hoit v. Russell*, 56 N. H. 559; *Railroad v. Greeley*, 23 N. H. 237; *Thorn-ton v. Campton*, 18 N. H. 20; *Hadley v. County*, 73 N. J. L. 197, 62 Atl. 1132; *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247; *Hart v. Langan*, 144 N. Y. 563, 39 N. E. 643; *In re Terminal*, 120 N. Y. Supp. 465; *Houston v. Western Washington R. Co.*, 204 Pa. 321, 54 Atl. 166; *State v. Superior Ct.*, 55 Wash. 64, 104 Pac. 148; *Seattle etc. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Washburn v. Milwaukee etc. R. R. Co.*, 59 Wis. 364, 18 N. W. 328; *Patterson v. Mississippi etc. Boom Co.*, 3 Dill. (U. S.) 465, and note, Fed. Cas. No. 10,829; *Lynch v. United States*, 138 Fed. 535, 71 C. C. A. 59; *Lafin v. Chicago etc. Ry. Co.*, 33 Fed. 415. Formerly in Iowa, the case of *Cherokee v. Sioux City etc. Co.*, 52 Iowa, 279, 3 N. W. 42, was regarded as an authority for this proposition, but in *Watkins v. Wabash R. Co.*, 137 Iowa, 441, 113 N. W. 924, it was expressly re-nounced. See note on "Admissibil-

ity of Opinion Evidence as to Market-ability of Title to Real Estate," to *Buswell v. O. W. Kerr Co.*, 21 Ann. Cas. 840.

²⁰ *Eldorado etc. R. Co. v. Everett*, 225 Ill. 529, 80 N. E. 281; *Chicago & S. L. R. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898; *Concordia Ceme-tery Assn. v. Minnesota etc. R. Co.*, 121 Ill. 199, 12 N. E. 536; *Hunt v. Boston*, 152 Mass. 168, 25 N. E. 82; *Gardner v. Brookline*, 127 Mass. 358; *Paine v. Boston*, 4 Allen (Mass.), 168; *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305; *Ham v. Salem*, 100 Mass. 350 (evidence as to sale of ice privilege seven or eight miles distant held too remote, the issue being the value of a similar privilege); *Packard v. Bergen Neck R. Co.*, 54 N. J. L. 553, 25 Atl. 506; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Mains v. Haight*, 14 Barb. (N. Y.) 76; *In re Thompson*, 1 Silv. Supreme 389, 5 N. Y. Supp. 370; *Dallas v. Boise*, 44 Or. 302, 75 Pac. 208; *Daigneault v. Woonsocket*, 18 R. I. 378, 28 Atl. 346; *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68; *Newbold v. International etc. R. Co.* (Tex. Civ. App. 1904), 78 S. W. 1079; *Washburn v. Milwaukee etc. R. Co.*, 59 Wis. 364, 18 N. W. 328.

of time to afford any aid in determining the real question in issue.²¹ In determining this question the court will consider whether or not the land is so situated that rapid changes have taken place in the value.²² It is another condition of the reception of such testimony that the other property should be *similar in character*. Thus it would be clearly incompetent, on the question of the values of farming lands, to prove the prices for which city property had been sold.²³ If testimony of

²¹ *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271, 34 Pac. 646; *Lanquist v. City of Chicago*, 200 Ill. 69, 65 N. E. 681 (sales seven years before held too remote); *Everett v. Union Pacific Ry. Co.*, 59 Iowa, 243, 13 N. W. 109 (sales ten or twelve years before held too remote); *May v. Boston*, 158 Mass. 21, 32 N. E. 902; *Hunt v. Boston*, 152 Mass. 168, 25 N. E. 82; *Patch v. Boston*, 146 Mass. 55, 14 N. E. 770; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668; *Gardner v. Brookline*, 127 Mass. 358 (sales three or four years before admitted); *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Green v. Fall River*, 113 Mass. 262; *Rowditch v. Boston*, 164 Mass. 107, 41 N. E. 132; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.), 115; *Hewitt v. Price*, 204 Mo. 31, 120 Am. St. Rep. 681, 102 S. W. 647; *Railroad Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182; *Sullivan v. Railroad Co.*, 29 Tex. Civ. App. 429, 68 S. W. 745 (a sale ten years before held too remote); *Washburn v. Milwaukee etc. R. Co.*, 59 Wis. 364, 18 N. W. 328.

²² *Gardner v. Brookline*, 127 Mass. 358; *Benham v. Dunbar*, 103 Mass. 365; *Chandler v. Jamaica Pond Co.*, 122 Mass. 305; *Dietrichs v. Lincoln & N. W. Ry. Co.*, 12 Neb. 225, 10 N. W. 718; *Kerr v. South Park Commis-*

sioners, 117 U. S. 379, 29 L. Ed. 924, 6 Sup. Ct. Rep. 801.

²³ *Chicago etc. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229; *O'Hare v. Chicago etc. R. Co.*, 139 Ill. 151, 28 N. E. 923; *Concordia Cemetery Assn. v. Minnesota R. R. Co.*, 121 Ill. 199; *Dady v. Condit*, 104 Ill. App. 507; *Illinois etc. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880; *Mier v. Phillips Fuel Co.*, 130 Iowa, 570, 107 N. W. 621; *Cummins v. Des Moines etc. R. Co.*, 63 Iowa, 397, 19 N. W. 268; *Kansas City etc. R. Co. v. Weidenmann*, 77 Kan. 300, 94 Pac. 146; *Kansas City & Topeka Ry. v. Splitlog*, 45 Kan. 68, 25 Pac. 202; *O'Malley v. Commonwealth*, 182 Mass. 196, 65 N. E. 30; *Quincy v. Boston*, 148 Mass. 389, 19 N. E. 519; *Thompson v. Boston*, 148 Mass. 387, 19 N. E. 406; *Patch v. Boston*, 146 Mass. 52, 14 N. E. 772 (in this case testimony was held competent, although one piece of land had buildings while the other had not); *Sawyer v. Boston*, 144 Mass. 471, 11 N. E. 711 (the lots need not be the same size); *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Benham v. Dunbar*, 103 Mass. 365; *Lawton v. Chase*, 108 Mass. 238; *Laing v. United New Jersey R. etc. Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682, 25 Atl. 409; *Bradshaw v. Rome etc. R. Co.*, 49 Hun, 605, 1 N. Y. Supp. 691; *Daigneault v. Woonsocket*, 18 R. I.

this character is to be admitted at all, it is evident that while the condition surrounding the different sales should be similar they need not be exactly the same. In those courts where such evidence is received, it is held to be very largely a question of judicial *discretion* whether the requisite similarity of conditions has been established.²⁴ And obviously the court in its discretion may so limit such testimony as to prevent the trial of collateral issues.²⁵ When testimony of this character is received, it is a requisite, as already stated, that the lands should be shown to be similar in character, situation and value.²⁶ It is also necessary that the witness should have *personal knowledge* of the other sales; hence mere hearsay or recitals in deeds of the consideration are not competent to prove the facts.²⁷ Clearly, evidence should not be received to prove what *offers* have been made to sell or what prices have been

378, 28 Atl. 346; *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68; *Dennis v. Dallas etc. Co.* (Tex. Civ. App.), 94 S. W. 1092 (in this case evidence of a witness whose lot had no house and was in a different locality from plaintiff's, which had buildings upon it, was excluded); *Fox v. Robbins* (Tex. Civ. App. 1902), 70 S. W. 597.

²⁴ *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.), 115; *Little Rock J. R. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; *Sawyer v. Boston*, 144 Mass. 471, 11 N. E. 711; *Presbrey v. Old Colony etc. R. Co.*, 103 Mass. 1; *Ham v. Salem*, 100 Mass. 350; *Laing v. United New Jersey Ry. Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682, 25 Atl. 409; *Paine v. Boston*, 4 Allen (Mass.), 168; *Stolze v. Manitowoc Term. Co.*, 100 Wis. 208, 75 N. W. 987.

²⁵ *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332.

²⁶ See cases cited above. As to estimated value of *whole tract* on hypothesis of same cut up into build-

ing lots, see *Spring Valley Waterworks v. City and County of San Francisco*, 192 Fed. 137. As to *price paid* as evidence of market value, see *Mattern v. Alderson*, 18 Cal. App. 590, 123 Pac. 972; *Wichita etc. R. Co. v. Wyriek* (Tex. Civ. App.), 147 S. W. 730. As to relevancy of appraisement and statements made to influence it on issue of market value, see *Shoemaker Co. v. Munsey*, 37 App. D. C. 95; *Gulf etc. R. Co. v. Koch* (Tex. Civ. App.), 144 S. W. 1035; *Sanitary Dist. of Chicago v. Corneau* (Ill.), 100 N. E. 517, land sold some years previously where party only bidder at sale; *Myers v. Bender* (Mont.), 129 Pac. 330, value of land as basis of attorney's fee. See *Ft. Worth etc. R. Co. v. Ayers* (Tex. Civ. App.), 149 S. W. 1068, as to evidence properly admissible in support of market value; *Eastman v. Dunn* (R. I.), 83 Atl. 1057, value of option to buy land.

²⁷ *Rose v. Taunton*, 119 Mass. 99; *Spaulding v. Knight*, 116 Mass. 148; *Esch. v. Chicago M. & St. P. Ry. Co.*, 72 Wis. 229, 39 N. W. 129.

asked or refused;²⁸ although it is obvious that the declarations of the party to the suit concerning the land in question, including offers to sell, may be received when such statements are in the nature of *admissions*.²⁹ Nor is it admissible to prove the amount received by way of *compromise* or settlement on condemnation proceedings.³⁰ Tax assessments do not bear on the subject of market value.³¹ The price paid by the owner for lands has been

²⁸ *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *Lehmick v. St. Paul etc. R. Co.*, 19 Minn. 464; *Davis v. Charles River Ry. Co.*, 11 Cush. (Mass.) 506; *Winisimmet Co. v. Grueby*, 111 Mass. 543; *Montclair Ry. Co. v. Benson*, 36 N. J. L. 557; *Sherlock v. Railroad Co.*, 130 Ill. 403, 22 N. E. 844; *Atkinson v. Chicago etc. Ry. Co.*, 93 Wis. 362, 67 N. W. 703; *Sharpe v. United States*, 112 Fed. 893, 57 L. R. A. 932, 50 C. C. A. 597; *Tennessee Coal & Iron Co. v. State*, 141 Ala. 103, 37 South. 433. Evidence as to the assessed valuation is not admissible: *Anthony v. New York P. & B. Ry. Co.*, 162 Mass. 60, 37 N. E. 780; nor as to the amount of assessments paid: *Nelson v. Village of West Duluth*, 55 Minn. 497, 57 N. W. 149.

²⁹ *Central Branch etc. R. R. Co. v. Andrews*, 37 Kan. 641; *Springfield v. Schmook*, 68 Mo. 394; *East Brandywine & W. Ry. Co. v. Ranck*, 78 Pa. 454; *Power v. Savannah S. & S. Ry. Co.*, 56 Ga. 471.

³⁰ *Howard v. Providence*, 6 R. I. 514; *Brunswick etc. R. Co. v. McLaren*, 47 Ga. 546; *Bennett v. New Bedford Ry. Co.*, 110 Mass. 433; *Springfield v. Schmook*, 68 Mo. 394; *Howe v. Howard*, 158 Mass. 278, 33 N. E. 528; *Wyman v. Lexington etc. R. Co.*, 13 Met. (Mass.) 316.

³¹ *Gayle v. Commissioners' Court*, 155 Ala. 204, 46 South. 261; *Savannah etc. R. Co. v. Buford*, 106 Ala.

303, 17 South. 395; *St. Louis etc. R. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786; *Texas etc. R. Co. v. Eddy*, 42 Ark. 527; *Central Pacific R. Co. v. Feldman*, 152 Cal. 303, 92 Pac. 849; *San Luis Obispo v. Brizzolara*, 100 Cal. 434, 34 Pac. 1083; *San Jose etc. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522; *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107; *Denver etc. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. 976; *Fort Collins Dev. R. Co. v. France*, 41 Colo. 512, 92 Pac. 953; *Carper v. Risdon*, 19 Colo. App. 530, 76 Pac. 744; *Storrs v. Robinson*, 74 Conn. 443, 51 Atl. 135; *Martin v. New York etc. R. Co.*, 62 Conn. 331, 25 Atl. 239; *Lewis v. Englewood El. R. Co.*, 223 Ill. 223, 79 N. E. 44; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; *Dudley v. Minnesota etc. R. Co.*, 77 Iowa, 408, 42 N. W. 359; *Scott v. O'Neill's Admr.*, 23 Ky. Law Rep. 331, 62 S. W. 1042; *New Orleans Pac. R. Co. v. Murrell*, 36 La. Ann. 344; *Thompson v. Williams*, 100 Md. 195, 60 Atl. 26; *Anthony v. New York etc. R. Co.*, 162 Mass. 60, 37 N. E. 780; *Kenerson v. Henry*, 101 Mass. 152; *Flint v. Flint*, 6 Allen (Mass.), 34, 83 Am. Dec. 615; *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786; *Nelson v. Duluth*, 55 Minn. 497, 57 N. W. 149; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165; *Concord Land & W. P. Co. v. Clough*, 69 N. H. 609, 45 Atl. 565; *Hamilton v. Seaboard etc. R. Co.*, 150

held to be relevant;³² but when used against him he is entitled to explain any special circumstances about the purchase.³³ A witness may, in forming his opinion, consider the uses and capabilities and *productive capacity* of the property, as well as the prices at which *like property* in the neighborhood has been sold. He may also base his opinion of value upon his knowledge or observation of the growth and development of towns and cities, a general knowledge of trade and business, rental value, the interest which the land would pay upon an investment, its productiveness, ease of cultivation, its situation in a particular community, and other elements.³⁴

N. C. 193, 63 S. E. 730; Ridley v. Seaboard etc. Co., 124 N. C. 37, 32 S. E. 379; Railroad v. West End Land Co., 137 N. C. 330, 107 Am. St. Rep. 490, 68 L. R. A. 333, 49 S. E. 350; Miller v. Windsor Water Co., 148 Pa. 429, 23 Atl. 1132; Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279; Commonwealth v. Tryon, 31 Pa. Sup. Ct. 146; Spink v. New York etc. Co., 26 R. I. 115, 58 Atl. 499; Wray v. Knoxville etc. R. Co., 113 Tenn. 544, 82 S. W. 471; Crystal City & N. R. Co. v. Isbell (Tex. Civ. App.), 126 S. W. 47; San Antonio v. Diaz (Tex. Civ. App.), 62 S. W. 549. In Vermont, however, they are deemed relevant: Town of Ripton v. Town of Brandon, 80 Vt. 234, 67 Atl. 541, distinguishing Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

³² St. Louis etc. R. Co. v. Smith, 42 Ark. 265; Southern R. Co. v. Williams, 113 Ga. 335, 38 S. E. 744; Terre Haute & I. R. Co. v. Smith, 65 Ill. App. 101; Swanson v. Keokuk & W. R. Co., 116 Iowa, 304, 89 N. W. 1088; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6; Mayor v. Smith & S. Brick Co., 80 Md. 458, 31 Atl. 423; March v. Portsmouth & C. R. R., 19 N. H. 372; Wolff v. Meyer, 75 N. J. L. 181, 66

Atl. 959; In re Hamilton Place, 67 Misc. Rep. 191, 122 N. Y. Supp. 660; West Chester & W. P. R. Co. v. Chester County, 182 Pa. 40, 37 Atl. 905; Belka v. Allen, 82 Vt. 456, 74 Atl. 91; Rawson v. Prior, 57 Vt. 612; State v. Court, 55 Wash. 64, 104 Pac. 148. But evidence of the cost of other land adjacent cannot be given except on cross-examination to test opinions of value: Enterprise Lumber Co. v. Porter, 155 Ala. 426, 46 South. 773; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; and in Connecticut it has been held a matter within the discretion of the court: Rosenstein v. Fairhaven & W. R. Co., 78 Conn. 29, 60 Atl. 1061.

³³ St. Louis etc. R. Co. v. Smith, 42 Ark. 265; Ham v. City of Salem, 100 Mass. 350.

³⁴ Atlanta etc. R. Co. v. Wood, 160 Ala. 657, 49 South. 426; Long Distance Tel. etc. Co. v. Schmidt, 157 Ala. 391, 47 South. 731; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; Benninghoff v. Palisade (Colo.), 108 Pac. 983; Borough of Norwalk v. Blanchard, 56 Conn. 461, 16 Atl. 242; West Stokie D. Dist. v. Dawson, 243 Ill. 175, 17 Ann. Cas. 776, 90 N. E. 777; Illinois etc. R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880; Chicago,

§ 169 (166). Same—Value of personal property—Services.—Although the question under consideration has caused most discussion in respect to sales of land, testimony has been received to show value of sales of similar *personal property* under similar conditions,³⁵ and the rules already stated with regard to the values of land apply for the most part to the value of personal property. Market

Burlington & Northern R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Chicago & Evanston R. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488; St. Louis, Vandalia & Terre Haute R. Co. v. Haller, 82 Ill. 209; New Jersey I. & L. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420; Ohio Valley R. etc. Co. v. Kerth, 130 Ind. 314, 30 N. E. 298; Covington Trans. Co. v. Piel, 87 Ky. 267, 8 S. W. 449; Kennebec W. Dist. v. Waterville, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6; Clagett v. Easterday, 42 Md. 617; Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. 294; Sveiven v. Thompson, 110 Minn. 484, 126 N. W. 131; King v. Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. 135; Russell v. St. Paul etc. R. Co., 33 Minn. 210, 22 N. W. 379; Board of Levee Commrs. v. Dillard, 76 Miss. 641, 25 South. 292; In re City of New York, 56 Misc. Rep. 306, 107 N. Y. Supp. 567; Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, 164 N. Y. 602, 58 N. E. 1087; Cleveland T. & V. R. Co. v. Gorsuch, 8 Ohio C. C. N. S., 297; Harrisburg etc. Co. v. Cumberland County, 225 Pa. 467, 74 Atl. 340; Pittsburg etc. R. Co. v. Rose, 74 Pa. 362; Chandler v. Geraty, 10 S. C. 304; Watkins Land Mtg. Co. v. Campbell, 98 Tex. 372, 84 S. W. 424; Ide v. Boston etc. R. Co., 83 Vt. 66, 74 Atl. 401; Weyer v. Chicago etc. R. Co., 68 Wis. 180, 31 N. W. 710; Forsyth v. Doolittle, 120 U. S. 73, 30 L. Ed. 586, 7 Sup. Ct. Rep. 408.

³⁵ Whorley v. Tennessee C. Expos. Co. (Tenn.), 62 S. W. 346; Davis v. Cotey, 70 Vt. 120, 39 Atl. 628; Norton v. Willis, 73 Me. 580; State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; Carr v. Moore, 41 N. H. 131. But indirect and comparative evidence when better is available has been properly rejected: Atchison etc. Co. v. Harper, 19 Kan. 529; Gouge v. Roberts, 53 N. Y. 619. Proof of value of sundry articles of personal property may be given without separate valuation of each article: Keegan v. Harlan, 134 Ill. App. 363. As to valuation of *growing potatoes*, see Rottlesberger v. Hanley (Iowa), 136 N. W. 776. As to valuation of stock by assets and liabilities of corporation, see White v. Jouett, 147 Ky. 197, 144 S. W. 55. As to valuation of cattle, see Houston Packing Co. v. Griffith (Tex. Civ. App.), 144 S. W. 1139; Houston etc. R. Co. v. Crowder (Tex. Civ. App.), 152 S. W. 183. As to long staple cotton, see Parish & Co. v. Yazoo etc. R. Co. (Miss.), 60 South. 322. As to value of glass, see Frohlich v. Independent Glass Co. (Mich.), 139 N. W. 5. As to value of hubs, see Martin v. Bunker-Cutter Lumber Co. (Mo. App.), 151 S. W. 984. As to value of furniture, see Worrall v. Des Moines etc. Assn. (Iowa), 138 N. W. 481. As to articles kept for use and not for sale, see Kates Transfer etc. Co. v. Klassen (Ala. App.), 59 South. 355.

value is here also the pivot around which the questions revolve and carries with it the signification present market value, that is to say, the value in the market on the day in question, or if no value is ascertainable for that day, then on the day nearest to it of goods of the same kind actually sold.³⁶ The market price of a commodity is a conclusion which is largely made up of presumptions, and may always be proved by the opinions of witnesses based of necessity, in part, at least, on hearsay.³⁷ If there is no market, then the actual value may be proved, as, for instance, by what it sold for in a *bona fide* transaction.³⁸ Where an article in question has a market value, such value is usually taken as the actual value of such article. The proof of value is generally by the judgment or opinion of witnesses.³⁹ If

³⁶ Torrey v. Burney, 113 Ala. 496, 21 South. 348; Kirchman v. Tuffi Bros. etc. Co., 92 Ark. 111, 122 S. W. 239; Jacksonville etc. Co. v. Peninsular etc. Co., 27 Fla. 1, 157, 17 L. R. A. 33, 9 South. 661; Kuhn v. Eppstein, 239 Ill. 555, 88 N. E. 174; Atchison etc. R. Co. v. Gabbert, 34 Kan. 132, 8 Pac. 218; Home etc. Co. v. Church, 14 Ky. Law Rep. 807; Newsome v. Davis, 133 Mass. 343; Lawton v. Chase, 108 Mass. 238; Northwestern Fuel Co. v. Mahler, 36 Minn. 166, 30 N. W. 756; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Park v. Chateaugay Iron Co., 44 Hun, 630, 8 N. Y. St. 507; Gill v. McNamee, 42 N. Y. 44; Ebenreiter v. Dahlman, 19 Misc. Rep. 9, 42 N. Y. Supp. 867; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Moye v. Pope, 64 N. C. 543; Kountz v. Kirkpatrick, 72 Pa. 376, 13 Am. Rep. 687; McNair v. Moore, 70 S. C. 551, 50 S. E. 197; La Rue v. St. Anthony etc. Co., 17 S. D. 91, 95 N. W. 292; Hardwick v. American Can Co., 113 Tenn. 657, 88 S. W. 797; Keipp v. State, 51 Tex. Cr. 417,

103 S. W. 392; Reeves v. Texas etc. R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920; Austin v. Langlois, 83 Vt. 104, 74 Atl. 489; McNicol v. Collins, 30 Wash. 318, 70 Pac. 753; Boyd v. Gunnison, 14 W. Va. 1; Monture v. Regling, 140 Wis. 407, 122 N. W. 1129; Gregory v. Rosenkrans, 78 Wis. 451, 47 N. W. 832.

³⁷ 1 Whart. Ev., § 448; Carey v. Penney, 165 Ala. 234, 51 South. 624; Burks v. Hubbard, 69 Ala. 379; Central R. etc. Co. v. Skellie, 86 Ga. 686, 12 S. E. 1017; City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; Washington Ice Co. v. Webster, 68 Me. 449; Morris v. Columbian Ironworks etc. Co., 76 Md. 354, 17 L. R. A. 851, 25 Atl. 417; Cleveland etc. R. Co. v. Perkins, 17 Mich. 296; Smith v. North Carolina R. Co., 68 N. C. 107; Texas etc. R. Co. v. Donovan, 86 Tex. 378, 25 S. W. 10; Norfolk etc. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521.

³⁸ Lundvick v. Westchester etc. Co., 128 Iowa, 376, 104 N. W. 429; Humphreys v. Minnesota Clay Co., 94 Minn. 469, 103 N. W. 338.

³⁹ 2 Sutherland on Damages, 375.

the article has no market value, its value may be shown by proof of such elements or facts affecting the question as may exist. Recourse may be had to the items of cost and its utility and use. The opinions of witnesses properly informed on the subject may be given in respect to its value.⁴⁰ And evidence of sales of similar articles under similar conditions, not remote either as to time or place, is not irrelevant.⁴¹ The value of animals especially calls

⁴⁰ 2 Sutherland on Damages, 378; Tevis v. Ryan, 13 Ariz. 120, 108 Pac. 461; Jacksonville etc. R. Co. v. Jones, 34 Fla. 286, 15 South. 924; Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 South. 846; Chicago v. Dickman, 105 Ill. App. 209; Lafayette B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Ohio etc. R. Co. v. Stribling, 38 Ill. App. 17; Yater v. Mullen, 23 Ind. 562; Morrill v. Bentley (Iowa), 126 N. W. 155; Nosler v. Chicago etc. R. Co., 73 Iowa, 268, 34 N. W. 850; Richmond etc. R. Co. v. Chandler (Miss. 1893), 13 South. 267; Conner v. Missouri etc. R. Co., 181 Mo. 397, 81 S. W. 145; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Whipple v. Walpole, 10 N. H. 130; Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 474; Melini v. Freige, 15 N. M. 455, 110 Pac. 563. Second-hand property is valued in the same way: Hawver v. Bell, 141 N. Y. 140, 36 N. E. 6; Todd v. Gamble, 67 Hun, 38, 21 N. Y. Supp. 739; Kirschmann v. Lediard & Ree, 61 Barb. (N. Y.) 573; Wemple v. Stewart, 22 Barb. (N. Y.) 154; Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133; Galveston etc. R. Co. v. Levy, 45 Tex. Civ. App. 373, 100 S. W. 195; Gulf etc. R. Co. v. Maetze, 2 Tex. App. Civ. Cas. 631; Wells etc. Express Co. v. Williams (Tex. Civ. App. 1902), 71 S. W. 314; Pennington v. Redman Van etc. Co., 34 Utah, 223, 97 Pac. 115; Collins v.

Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

⁴¹ Perkins v. Ewan, 66 Ark. 175, 49 S. W. 569; Western & A. R. Co. v. Calhoun, 104 Ga. 384, 30 S. E. 868; Cleghorn v. Love, 24 Ca. 590; Simpson v. Cincinnati etc. R. Co., 81 Ga. 495, 8 S. E. 524; Gatling v. Newell, 9 Ind. 572; Galliers v. Chicago etc. R. Co., 116 Iowa, 319, 89 N. W. 1109; Truitt v. Baird, 12 Kan. 420; Home Constr. Co. v. Church, 14 Ky. Law Rep. 807; Newsome v. Davis, 133 Mass. 343; Murray v. Stanton, 99 Mass. 345; Croak v. Owens, 121 Mass. 28; Lawton v. Chase, 108 Mass. 238; Eaton v. Mellus, 7 Gray (Mass.), 566; Kendrick v. Beard, 90 Mich. 589, 51 N. W. 645; Burger v. Northern Pac. R. Co., 22 Minn. 343; Stearns v. Johnson, 17 Minn. 142; Alabama etc. R. Co. v. Searles, 71 Miss. 744, 16 South. 255; Kelsea v. Fletcher, 48 N. H. 282; Griggs v. Day, 136 N. Y. 162, 32 Am. St. Rep. 704, 18 L. R. A. 120, 32 N. E. 612; De Groot v. Fulton F. Ins. Co., 4 Robt. (N. Y.) 504; Belden v. Nicolay, 4 E. D. Smith (N. Y.), 14; Hoffman v. Aetna F. Ins. Co., 1 Robt. (24 N. Y. Super.) 501; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; Jonas v. Noel, 98 Tenn. 440, 36 L. R. A. 862, 39 S. W. 724; Pacific Exp. Co. v. Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898; Reeves v. Texas etc. R. Co., 11 Tex. Civ. App. 514, 32 S. W.

for that extrinsic evidence which might otherwise be considered outside the rule. Dogs are property, and the owner may recover damages against a trespasser injuring them, although they have no market value. The value of a dog may be either his market value, or some special or peculiar value to his owner, to be ascertained by reference to the usefulness and services of the dog. In an action to recover for a malicious injury to dogs, evidence that they were useful and of special value to the owner will sustain a recovery, although they are not shown to have had any market value.⁴² In that regard, too, the pedigree of animals as affecting their value is relevant. For instance, the pedigree of a racehorse constitutes an important element in determining its value, as it is matter of common knowledge that a much larger proportion of thoroughbred horses are successful than horses not so bred.⁴³

920; *Pitt v. Texas Storage Co.* (Tex. App. 1892), 18 S. W. 465; *Melvin v. Bullard*, 35 Vt. 268; *Henry v. North American Ry. Const. Co.*, 158 Fed. 79, 85 C. C. A. 409. In a recent Missouri case, however, *Nugent v. Armour Packing Co.* (Mo. App.), 81 S. W. 506, the price paid for stone similar to that used in a building, the subject of the action, was held inadmissible. Where property was transferred in payment of a debt, the debt cannot be regarded as the market value: *In re Real Estate Inv. Co.*, 215 Pa. 50, 64 Atl. 331.

⁴² *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804, 13 L. R. A. 272, 16 S. W. 931; *Ramsey v. Hurley*, 72 Tex. 200, 12 S. W. 56; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85; *Brent v. Kimball*, 60 Ill. 213, 14 Am. Rep. 35; *Uhlein v. Cromack*, 109 Mass. 273; *Perry v. Phipps*, 10 Ired. (N. C.) 261, 51 Am. Dec. 387; *Parker v. Mise*, 27 Ala. 483, 62 Am. Dec. 776; *Harrington v. Miles*, 11 Kan. 483, 15 Am. Rep. 355; *Cantling v. Hannibal etc. R. R. Co.*, 54 Mo. 386,

14 Am. Rep. 476; *Spray v. Ammerman*, 66 Ill. 313; *Stickney v. Allen*, 10 Gray (Mass.), 355; *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513, 17 L. R. A. 773, 53 N. W. 535.

⁴³ *Louisville & N. R. Co. v. Kice*, 22 Ky. Law Rep. 1462, 60 S. W. 705; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. 898; *Texas & P. Ry. Co. v. Slator* (Tex. Civ. App.), 102 S. W. 156; *Ohio etc. R. Co. v. Stribling*, 38 Ill. App. 17; *Pittsburgh C. C. & St. L. R. Co. v. Shepard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; *Richmond & D. R. Co. v. Chandler* (Miss.), 13 South. 267. As affecting the question of value, the pedigree of an animal may be shown by the production of a printed register, or book of pedigrees, when accompanied by proof of the identity of the animal. The only qualification respecting the book is that it shall be identified as one kept up by or in the interest of breeders for the information of the public, and that it is generally accepted as authoritative: *Kuhns v. Railway*, 65

When a market value has not been created, the opinions of farmers who have dealt in the kind of animals which are the subject matter of inquiry is relevant as to value.⁴⁴ With regard to *personal services* rendered without any agreement as to the amount to be charged for them, inasmuch as the law implies that they are to be paid for at a reasonable rate, it is manifest some means must exist for giving evidence of that rate to the court. The mode of conveying it has led to several nice distinctions, for while the plaintiff may produce testimony of the nature of the service,⁴⁵ and the necessary qualifications for it,⁴⁶ and the value put upon it by witnesses competent to estimate its worth,⁴⁷ the bare evidence of usual or probable charges

Iowa, 528, 22 N. W. 661; Warrick v. Reinhard, 136 Iowa, 27, 111 N. W. 983.

⁴⁴ Railway Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731; Burlington etc. R. R. v. Campbell, 14 Colo. App. 141, 59 Pac. 424.

⁴⁵ Bell v. Welch, 38 Ark. 139; Fry v. Lofton, 45 Ga. 171; Barnes v. Sisson, 44 Ill. App. 327; McFadden v. Ferris, 6 Ind. App. 454, 32 N. E. 107; Carruthers v. Towne, 86 Iowa, 318, 53 N. W. 240; Stanton v. Clinton, 52 Iowa, 109, 2 N. W. 1027; Caverly v. McOwen, 123 Mass. 574; State v. Elliott, 82 Mo. App. 458; Jersey Co. v. Davison, 29 N. J. L. 415; Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225; Reynolds v. Robinson, 64 N. Y. 589; Garr v. Mairet, 1 Hilt. (N. Y.) 493; Thompson v. Stevens, 71 Pa. 161; Plattsburg First Nat. Bank v. Post, 66 Vt. 237, 28 Atl. 989; Nixon v. Phelps, 29 Vt. 198; Houghton v. Paine, 29 Vt. 57. As to the remedies of wrongfully discharged servant and evidence in actions therefor, see extended note to Howay v. Going Northrup Co., 6 L. R. A., N. S., 49.

⁴⁶ Evans v. Horton, 93 Ala. 379, 9 South. 534; Harris v. Russell, 93 Ala. 59, 9 South. 541; Hull v. Gallup, 49 Conn. 279; Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Hall v. Stanley, 86 Ind. 219; Graves v. Jacobs, 8 Allen (Mass.), 141; Low v. Connecticut etc. R. Co., 45 N. H. 370; Kingsbury v. Moses, 45 N. H. 222; Johnson v. Myers, 103 N. Y. 663, 9 N. E. 52; Gall v. Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Millener v. Driggs, 10 N. Y. St. 237; Jeffries v. Harris, 10 N. C. 105; Cohen v. Stein, 61 Wis. 508, 21 N. W. 514.

⁴⁷ Mayhew v. Brislin, 13 Ariz. 102, 108 Pac. 253; Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700; Cowdery v. McChesney (Cal.), 58 Pac. 62; Ferry v. Henderson, 32 App. D. C. 41; Carter v. Cairo etc. R. Co., 145 Ill. App. 653; Allen v. Urdangen, 141 Iowa, 280, 119 N. W. 724; Holiday v. Watson, 6 Ky. Law Rep. 590; Wallace v. Schaub, 81 Md. 594, 32 Atl. 324; Shattuck v. Train, 116 Mass. 296; Hiale v. Hiale, 157 Mich. 45, 121 N. W. 465; Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154; Ryans v. Hospes, 167 Mo. 365,

either by others or the plaintiff himself will surely lead to some collateral issue and render the testimony inadmissible. The proper method is to produce evidence of the price which a competent man would charge for that particular service, or has charged for similar services.⁴⁸ As to *attorneys* and *physicians*, the law is very much the same. The professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result, must all be taken into consideration in fixing the value of the services rendered.⁴⁹ In addition to this direct

67 S. W. 285; Ward v. Kropf, 120 N. Y. Supp. 476; Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225; Worden v. Connell, 196 Pa. 281, 46 Atl. 298; Hulst v. Benevolent Hall Assn., 9 S. D. 144, 68 N. W. 200; Pfeil v. Kemper, 3 Wis. 315; Floore v. Burgher (Tex. Civ.), 128 S. W. 1152; Harvey v. United States, 113 U. S. 243, 28 L. Ed. 987, 5 Sup. Ct. Rep. 465.

⁴⁸ Alabama Securities Co. v. Dewy, 156 Ala. 530, 47 South. 55; Harris v. Russell, 93 Ala. 59, 9 South. 541; Collins v. Fowler, 4 Ala. 647; Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664; Trenor v. Central Pac. R. Co., 50 Cal. 222; Geiger v. Kiser, 47 Colo. 297, 107 Pac. 267; Fleming v. Wells, 45 Colo. 255, 101 Pac. 66; Hull v. Gallup, 49 Conn. 279; Robbins v. Harvey, 5 Conn. 335; Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933; Haish v. Payson, 107 Ill. 365; Evans v. Koons, 10 Ind. App. 603, 38 N. E. 350; Allen v. Urdangen, 141 Iowa, 280, 119 N. W. 724; Peters v. Davenport, 104 Iowa, 625, 74 N. W. 6; Forey v. Western Stage Co., 19 Iowa, 535; French v. Frazier's Admr., 7 J. J. Marsh. (Ky.) 425; Holiday v. Watson, 6 Ky. Law Rep.

590; Murray v. Ware, 1 Bibb (Ky.), 325, 4 Am. Dec. 637; Morris v. Columbian Iron etc. Wks., 76 Md. 354, 17 L. R. A. 851, 25 Atl. 417; McKnight v. Detroit etc. R. Co., 135 Mich. 307, 97 N. W. 772; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Gurley v. Bunch, 130 Mo. App. 665, 108 S. W. 1109; Cornelius v. Grant, 8 Mo. 59; Thompson v. Gaffey, 52 Neb. 317, 72 N. W. 314; Low v. Connecticut etc. R. Co., 45 N. H. 370; Harrison v. Tinker, 8 Jones & S. (N. Y. Super.) 544; Whipple v. Farrelly, 136 App. Div. 587, 121 N. Y. Supp. 117; Allen v. Lowe, 19 Ohio C. C. 353, 10 Ohio Cir. Dec. 353; Lloyd v. Kerley (Tex. Civ. App.), 106 S. W. 696; Cooper v. Gordon (Tex. Civ. App.), 23 S. W. 608; Noyes v. Fitzgerald, 55 Vt. 49; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Kvammen v. Meridean M. Co., 58 Wis. 399, 17 N. W. 22; Pfeil v. Kemper, 3 Wis. 315; Walker Mfg. Co. v. Knox, 136 Fed. 334, 69 C. C. A. 160.

⁴⁹ Vilas v. Downer, 21 Vt. 419; Eggleston v. Boardman, 37 Mich. 14; Kentucky Bank v. Combs, 7 Pa. 543; Stanton v. Embrey, 93 U. S. 557, 23 L. Ed. 983.

evidence, witnesses who know what the usual fees for such services are in the locality in which the services are rendered, and who are familiar with the character and standing of the attorney who renders them, and with the services he has rendered, are competent to give an opinion of the value of such services. The amount that should be received by an attorney for his professional services in any case must be measured by the fees usually obtained by attorneys of similar experience and standing for like services in the same courts or in the same vicinity in which the services are rendered.⁵⁰ Beyond the usual and direct evidence of their services and the value of them, the customary charges of *physicians* for like services in the same locality or neighborhood are relevant. In other respects also the law regarding extrinsic evidence of the value of their services is parallel with that of attorney.⁵¹

⁵⁰ Fuller v. Stevens (Ala.), 39 South. 623; Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Nathan v. Brand, 167 Ill. 607, 47 N. E. 771; Reynolds v. McMillan, 63 Ill. 46; McNiel v. Davidson, 37 Ind. 336; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611; Calvert v. Coxe, 1 Gill (Md.), 95, 116; Eggleston v. Boardman, 37 Mich. 14; Allison v. Scheeper, 9 Daly (N. Y.), 365; Christy v. Douglas, Wright (Ohio), 485; Thompson v. Boyle, 85 Pa. 477; Hamman v. Willis, 62 Tex. 507; Vilas v. Downer, 21 Vt. 419; Cunning v. Kemp, 22 Wis. 509; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Ward v. Kohn, 58 Fed. 462, 7 C. C. A. 314, which contains *inter alia* the following clear statement of Circuit Judge Sanborn: "In the absence of a contract price, attorneys are entitled to receive what they deserve for their services. The amount of their compensation must vary with the place in which their services are rendered, for the same services are of more value in

a large and prosperous commercial city than in a small country town; with the character and standing of the lawyer who renders them, for the services of an attorney of ripe experience, great learning, eminent ability, and high reputation deserve and command better compensation than those of the tyro in the profession; with the importance of the matters involved in the litigation, for the same services deserve more compensation where life, liberty, character, or large amounts of property are at stake than where but a few dollars are in dispute; and with the results attained, for success earns a better reward than failure."

⁵¹ Jonas v. King, 81 Ala. 285, 1 South. 591; Trenor v. Central Pac. R. Co., 50 Cal. 222; Styles v. Tyler, 64 Conn. 432, 30 Atl. 165; Marion Co. v. Chambers, 75 Ind. 409; Piper v. Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

§ 170 (167). **Direct proof of intent, motives and belief.** It is a grave question whether the most satisfactory mode of proving the motives or intent with which an act is done is to show the facts and circumstances accompanying the act. True, that formerly it was the only way, but when, as now, the evidence of the parties is generally available, the avowal of the intention becomes of necessity a material factor in enabling a tribunal to arrive at a conclusion unhampered by all the speculations which surround the inferences to be drawn from acts or conduct. The sphere of inquiry is diminished in size, and while the stated motive is by no means conclusive, it has the salutary effect, that if the jury believe it to be the truth by reason of its being consistent with the behavior of the party, their search for the truth is sooner ended, while, on the other hand, if they disbelieve it, the party avowing it has shut off the right to the benefit of any other intention which might otherwise have been ascribed to his acts and of which he would thus wrongly have reaped the advantage. It is not relevant for a witness to state the motives or intentions of *another* person.⁵² It has been held in a few cases that a party cannot state directly his own motives or intent; that such testimony cannot be directly contradicted and because it must often be of little value, the proof must consist of the surrounding circumstances which illustrate the nature of the act.⁵³ These cases, however, need no longer weigh with the lawyer, except that in Alabama they are still law on the ground that such testimony is not susceptible of contradiction.⁵⁴ In Alabama, however, they recognize cer-

⁵² Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; Manufacturers' Bank v. Koch, 105 N. Y. 630, 12 N. E. 9; State v. Kilburn, 16 Utah, 187, 52 Pac. 277; State v. Carrington, 15 Utah, 480, 50 Pac. 526; Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; State v. Pierce, 85 Minn. 101, 88 N. W. 417.

⁵³ McKown v. Hunter, 30 N. Y. 625; Alabama Fertilizer Co. v. Rey-

nolds, 79 Ala. 497; McCormick v. Joseph, 77 Ala. 236; Whizenant v. State, 71 Ala. 383; Burke v. State, 71 Ala. 377; Wheless v. Rhodes, 70 Ala. 419; Leland v. Converse, 181 Mass. 487, 63 N. E. 939; Bolen v. State, 26 Ohio St. 371; Haywood v. Foster, 16 Ohio, 88.

⁵⁴ A long list of cases, among the latest being Arnold v. Cofer, 135 Ala. 364, 33 South. 539; Merchants' Bank

tain modifications to their general rule that a witness cannot testify to his uncommunicated motives or intentions. There is an exception to the rule, to the effect that, where a witness is sought to be impeached by showing by him on cross-examination that he has made contradictory statements, he may be asked in rebuttal why he made the statements in question.⁵⁵ And in a later case⁵⁶ it was held that on the cross-examination of the defendant, who was examined as a witness on his own behalf, when he was asked, "What did you have the gun for?" it was legitimate to make the inquiry, his motive being proper to be inquired of. It is also held there that claiming adverse possession is a fact and not a statement of mental attitude or undisclosed intention.⁵⁷ In the remainder of the states there seems to be a complete abandonment of a doctrine which is unsound and illogical. The reason why a person did a certain act may be most difficult to gather from his acts—perhaps impossible—and where equivocal acts are charged to him as having been done with a malevolent intention, his protection may often lie in a statement of what actuated him in the line of conduct which is the subject of inquiry. At this date it is the prevailing rule, sustained by the great weight of authority, that whenever the motive,

v. Acme Lumber etc. Co., 160 Ala. 435, 49 South. 782; *Broyles v. Central etc. R. Co.*, 166 Ala. 616, 139 Am. St. Rep. 50, 52 South. 81; *Bush v. State*, 168 Ala. 77, 53 South. 266; *Birmingham R. etc. Co. v. Humphries (Ala.)*, 55 South. 307; *McIntyre v. State (Ala.)*, 55 South. 639; *Weaver v. State (Ala.)*, 55 South. 956. So in Ohio, a person on trial for assault with intent to murder cannot testify as to the intent with which he made the assault, at least without showing that it was thereby intended to disprove the felonious intent charged. And a witness cannot testify as to what he intended, or his motive in asking questions of another, in a conversation

which he is narrating. His meaning must be gathered from the import of the language, without the aid of a subsequent explanation of his own language: *Haywood v. Foster*, 16 Ohio, 88; *Bolen v. State*, 26 Ohio St. 371.

⁵⁵ *Johnson v. State*, 102 Ala. 1, 16 South. 99; *Campbell v. State*, 23 Ala. 44, 76; *Williams v. State*, 123 Ala. 39, 26 South. 521.

⁵⁶ *Hill v. State*, 156 Ala. 3, 46 South. 864.

⁵⁷ *Dorlan v. Westervitch*, 140 Ala. 283, 103 Am. St. Rep. 35, 37 South. 382; *Hardy v. Randall (Ala.)*, 55 South. 997.

intention or belief of a person is relevant to the issue, it is competent for such person to *testify directly upon that point*, whether he is a party to the suit or not. To state the rule in another form, when the motive of a witness in performing a particular act or in making a particular declaration becomes a material issue in a cause or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness.⁵⁸ It is hardly necessary to add that such testimony is *not conclusive* as against the facts and circumstances which tend to illustrate the motive or intent.⁵⁹ It is an important qualification of the rule that testimony of this character should not be received to *change the import of a contract*, as to the terms of which there is no dispute, or in violation of the rule which forbids the admission of parol testimony to vary written in-

⁵⁸ *Watson v. Cheshire*, 18 Iowa, 202, 87 Am. Dec. 382; *Berkey v. Judd*, 22 Minn. 287; *Anderson v. Wehe*, 62 Wis. 401, 22 N. W. 584; *Germania Fire Ins. Co. v. Stone*, 21 Fla. 555; *Snow v. Paine*, 114 Mass. 520; *Thurston v. Cornell*, 38 N. Y. 281; *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Roddy v. Finnegan*, 43 Md. 490; *Cortland County Superintendent v. Superintendent etc.*, 44 N. Y. 22; *Norris v. Morrill*, 40 N. H. 395; *Wheelden v. Wilson*, 44 Me. 11. Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows and can testify directly what that purpose or

understanding was: *Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601; citing *Hale v. Taylor*, 45 N. H. 405; *Fisk v. Inhabitants of Chester*, 8 Gray (Mass.), 506; *Thacher v. Phinney*, 7 Allen (Mass.), 146; *Lombard v. Oliver*, 7 Allen (Mass.), 155; *Seymour v. Wilson*, 14 N. Y. 567; *Berkey v. Judd*, 22 Minn. 287; *City Nat. Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758; *Bowers v. Atchison etc. Co.*, 82 Kan. 95, 107 Pac. 777. See notes to *Gardom v. Woodward*, 21 Am. St. Rep. 314; *Jarrell v. Young etc. Co.*, 23 L. R. A., N. S., 367; *Fleet v. Tichenor*, 34 L. R. A., N. S., 323. See note on "Testimony of Voter as to His Intention in Casting Ballot," *Easterbrooks v. Atwood*, Ann. Cas. 1912A, 296.

⁵⁹ *People v. Farrell*, 31 Cal. 576; *Wilson v. Noonan*, 35 Wis. 355; *Plank v. Grimm*, 62 Wis. 251, 22 N. W. 470; *Griffin v. Marquardt*, 21 N. Y. 121. The court, in *Anderson v. Wehe*, 62

struments.⁶⁰ The cases cited in the next section show that the rule under discussion applies alike to civil and criminal cases.

§ 170a (167). **Same—Illustrations.**—The following may be taken as types of the application of the rule to various classes of cases, and under numerous different circumstances. In actions for *malicious prosecution* it is competent to ask the defendant, he being a witness in his own behalf, if at the time he instituted the prosecution complained of he believed that the claim upon which the same was founded was a valid and legal claim against the person prosecuted, and he may also be allowed to testify that he acted in good faith, and had no malice or ill-feeling against the plaintiff, and he may further testify as to his motive in instituting the prosecution complained of; or in such action the defendant may testify that when he made complaint against the plaintiff for perjury he believed him to be guilty of the charge against him.⁶¹ A belief in the guilt of the plaintiff as to the offense charged is one of the relevant and pertinent facts to be shown by the defendant in support of his claim of probable cause in making the accusation. Nor can it be claimed that in addition to proof of his honest belief in the guilt of the plaintiff, it is not equally pertinent on the distinct issue of malice for the defendant to show such belief and his reason, motive and good faith in making the criminal charge. As a general proposition, the right of a defendant to present evidence on these matters as bearing on the issues of probable cause and malice may not be disputed, and the only question is,

Wis. 402, 22 N. W. 584, said: "It is true that this court, as well as many other courts, holds that, upon a question of intent with which an act was done, the party doing the act may testify directly; but it has never been held that such direct negative testimony must necessarily outweigh the evidence of facts and circumstances tending to prove such intent."

⁶⁰ *Dillon v. Anderson*, 43 N. Y.

231; *Cake v. Pottsville Bank*, 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302; *Spencer v. Colt*, 89 Pa. 314; *Browne v. Hickie*, 68 Iowa, 330, 27 N. W. 276; *Quimby v. Morrill*, 47 Me. 470; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326.

⁶¹ *Vansickle v. Brown*, 68 Mo. 627; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *McKown v. Hunter*, 30 N. Y. 625.

Must the state or condition of mind of the defendant, respecting belief, motive and good faith, be restricted to proof of acts and circumstances accompanying or surrounding the accusation; or, in addition thereto, is the defendant a competent witness to testify directly respecting them? Under the uniform rule of the authorities he unquestionably is.⁶² The rule is well settled that where the malice, intent or motive of the party is under the issues in the case a material fact to be established, the testimony of the party himself directly to the point is competent evidence to prove it.⁶³ As to whether or not an assignment, transfer, or sale

⁶² *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082. The two essential facts which must concur to support an action for malicious prosecution are want of probable cause and malice and the burden of proving both is upon the plaintiff. Malice in fact is really the foundation of the action and is usually the pivotal point upon which the action turns. It is always a fact directly in issue. Its existence may be inferred by the jury from want of probable cause for the prosecution or from acts or declarations of the defendant expressing or indicating prejudice, ill-will or malicious motive in the matter of the prosecution. The want of probable cause does not raise a legal presumption of malice; the law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution, infer malice therefrom, although malice is not a necessary inference to be deduced therefrom. But in whatever way it may be proven, whether by inference from want of probable cause or by acts or declarations of the defendant manifesting prejudice or ill-will, it must be proven as a fact. This being true, and it being equally true that what-

ever the plaintiff must prove, the defendant may disprove, the latter has an unquestioned right to introduce any competent evidence to show that he had probable cause for instituting the criminal prosecution or that even if he did not have, he was not actuated by malice in doing so. It is to be noted in this connection that in support of the defense of probable cause, it must appear that the defendant had reasonable grounds to believe, and that, in fact, he did believe, the charge he made was well founded. It is not sufficient that the facts and circumstances were such as would lead a reasonable and prudent man to believe that the offense charged was committed, but it must also appear that he acted upon them in an honest and reasonable belief that the defendant was guilty. Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief: *Harkrader v. Moore*, 44 Cal. 144; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31.

⁶³ *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Fleet v. Tichenor*, 156 Cal. 343, 104 Pac. 458; *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A., N. S., 455, 94 Pac. 606; *Barnhart v. Fulkerth*, 93 Cal. 497, 29

of property was made to hinder, delay, or *defraud creditors*, it is competent, when the assignor or seller is a witness, to inquire of him whether or not, in making the sale, assignment, or transfer, he intended to delay or defraud his creditors.⁶⁴ The rule is thus laid down in an oft-quoted Michigan case: "It is alleged as error that the court allowed the assignor to answer what his intentions were in making the assignment. The main inquiry in the case was concerning this intention. Intention is generally proved by circumstances, because usually there is no other mode of proof. But when the only person who knows the facts

Pac. 50; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791. The direct testimony of the defendant as to his belief, motive and intent in making a criminal charge is competent evidence on the question of malice in fact, and pertinent also to his defense of the existence of probable cause for the prosecution.

The general rule announced is applied in numerous cases where the actions were for malicious prosecution and the questions put to the defendants were practically identical. In the following cases the direct question put to the defendant was whether when he made the complaint he believed it to be true or believed plaintiff guilty: *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. 46; *Garrett v. Mannheimer*, 24 Minn. 193; *Sparling v. Conway*, 75 Mo. 510; *Turner v. O'Brien*, 5 Neb. 542; *McKown v. Hunter*, 30 N. Y. 622; *White v. Tucker*, 16 Ohio St. 468. In the following cases the direct inquiry was made to defendant as to his motive in making the charge: *Flickinger v. Wagner*, 46 Md. 600; *Leake v. Carlisle*, 75 N. Y. Supp. 382; *Schwartz v. Van Wie etc. Co.*, 60 App. Div. 475, 69 N. Y. Supp. 978. In others the direct inquiry put to the defendant was whether in making the charge

he was actuated by malice or ill-will: *Coleman v. Henrich*, 2 Mack. (D. C.) 189; *Campbell v. Baltimore & O. R. R. Co.*, 97 Md. 341, 55 Atl. 532; *McCormack v. Perry*, 47 Hun (N. Y.), 71; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549. In the case of *Van Sickle v. Brown*, 68 Mo. 627, the direct question asked of defendant was whether he acted in good faith in making the charge, and in *Sherburne, Admr., etc. v. Rodman*, 51 Wis. 479, 8 N. W. 414, the court was considering rulings upon direct questions asked the defendant upon all of the above matters in the same manner in which they were directed to the defendant in this case: *Runo v. Williams, supra*.

⁶⁴ *Seymour v. Wilson*, 14 N. Y. 567; *Germania Fire Ins. Co. v. Stone*, 21 Fla. 555; *Sedgwick v. Tucker*, 90 Ind. 271; *Snow v. Paine*, 114 Mass. 520; *Manufacturers' etc. Bank v. Koch*, 105 N. Y. 630, 12 N. E. 9; *Miner v. Phillips*, 42 Ill. 123; *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196; *Gardom v. Woodward*, 44 Kan. 758, 21 Am. St. Rep. 310, 25 Pac. 199; *Wilson v. Clark*, 1 Ind. App. 182, 27 N. E. 310; *Stearns v. Gosselin*, 58 Vt. 38, 3 Atl. 193; *Thacher v. Phinney*, 7 Allen (Mass.), 146; *Forbes v. Waller*, 25 N. Y. 430.

is accessible as a witness, his answer must necessarily be more direct evidence than any other; and if there is any reason to suspect his candor, the jury can make all the allowances called for by his position and demeanor. The evidence was admissible."⁶⁵ When the *good faith* of a purchase is sought to be impeached as against creditors, the purchaser may be examined as to the intention with which it was made. A party charged with having obtained a contract by means of misrepresentations may testify that he acted in good faith in making them. Again, where a mortgage is assailed on the ground that it was made to hinder, delay, and defraud the creditors of the mortgagor, the mortgagee may testify as to the motive which induced him to take the mortgage.⁶⁶ The same principle must apply to the "understanding" of a party relative to the meaning or effect of a contract. To prove a contract, it must be shown (except in cases where the doctrine of estoppel applies) that both parties have understandingly assented to the same thing in the same sense.⁶⁷ But although the issue on trial is whether there has been a concurrence in understanding of two parties, yet it is not improper to prove separately the understanding of each.⁶⁸ On the question as to whether or not a deed was signed by a grantor with knowledge of its contents, his testimony that he never intended to convey his land to the grantee named in the deed is admissible. So a party to a deed may testify that he executed it in good faith, when its validity is in issue.⁶⁹ On an issue as to whether or not land has been dedicated to a public use, the intention to

⁶⁵ *Watkins v. Wallace*, 19 Mich. 56, 75.

⁶⁶ *Bedell v. Chase*, 34 N. Y. 386; *Phelps v. George's Creek etc. Co.*, 60 Md. 536; *Wheelden v. Wilson*, 44 Me. 11; *Thacher v. Phinney*, *supra*; *Blossi v. Chicago & N. W. Ry. Co.*, 144 Iowa, 697, 123 N. W. 360; *Frost v. Rosecrans*, 66 Iowa, 405, 23 N. W. 895;

Thurston v. Cornell, 38 N. Y. 281; *Perry v. Porter*, 121 Mass. 522.

⁶⁷ 1 *Parsons on Contracts*, 4th ed., 399b.

⁶⁸ See *Hale v. Taylor*, 45 N. H. 405, 507; *Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601.

⁶⁹ *Thacher v. Phinney*, 7 Allen (Mass.), 146; *Perry v. Porter*, 121 Mass. 522.

dedicate or not to dedicate, on the part of the *owner* of the land, is a prime element in determining whether there has been a dedication in fact, and such owner may testify as to what his intention really was.⁷⁰ Where the validity of a chattel mortgage is assailed on the ground of *fraud*, the mortgagee may testify that he did not know that it was made by the mortgagor with intent to defraud his creditors, and that he himself had no such motive in taking it.⁷¹ One may testify to his intent in making a certain payment.⁷² In an action to obtain a reconveyance of land deeded by a brother to a sister without consideration, it is competent for the plaintiff to testify that in making the deed of gift to his sister he relied upon her promise to reconvey the property to him, and that he had no legal advice regarding its execution, except the advice given him by his sister's attorney.⁷³ While on an issue involving "good faith" a party may testify as to his mental state, the jury are not concluded by what he says in reference thereto, but may test its truthfulness by comparing such claim with all the circumstances attending the transaction.⁷⁴ Whenever the question of intent is material in determining the question of domicile or residence, as for voting or other purposes, the party in interest may testify as to the intent with which he removed from one place to another.⁷⁵ In the trial of *criminal cases*, it is a general rule that where the intent is an essential element to constitute the crime for which the prisoner is on trial, he has the right to testify as to his intent in doing any act which is claimed to prove criminal intent.⁷⁶ Before defendants in criminal cases were permitted to testify in their own behalf, there

⁷⁰ *Bidinger v. Bishop*, 76 Ind. 244.

⁷¹ *Frost v. Rosecrans*, 66 Iowa, 405, 23 N. W. 895.

⁷² *Stearns v. Gosselin*, 58 Vt. 38, 3 Atl. 193.

⁷³ *Fagan v. Lentz*, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951.

⁷⁴ *Thompson v. Glover*, 120 Ga. 440, 47 S. E. 935.

⁷⁵ *Lombard v. Oliver*, 7 Allen (Mass.), 155; *Fisk v. Inhabitants of Chester*, 8 Gray (Mass.), 506; *Kennedy v. Ryall*, 67 N. Y. 379; *Albion v. Maple Lake*, 71 Minn. 503, 74 N. W. 282.

⁷⁶ *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *People v. Farrell*, 31 Cal. 576.

was no means of ascertaining the intent with which they did any particular act, except as it could be inferred from the facts and circumstances attending it. The intent, however, was always a fact necessary to be established, where it constituted an essential element in the crime charged. Now that defendants are permitted to testify in their own behalf, there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained. The rule has been applied on the trial of an indictment for *assault and battery* with intent to commit a felony, where the defendant was allowed to testify as to what was his intention in committing the assault;⁷⁷ and in cases of *rape*.⁷⁸ In the trial of an indictment for *larceny*, the defendant may testify as to what his intention was at the time that the goods came into his possession, in regard to converting them to his own use.⁷⁹ In trespass *quare clausum*, where the malice of the defendant may be ground for exemplary damages, he, being a competent witness, may testify what his motive and purpose was in doing the acts complained of.⁸⁰ On the trial of a charge of obtaining goods or property by means of *false pretenses*, with intent to defraud, the defendant may testify as to the intent with which he received the goods or property.⁸¹ On a trial for *manslaughter* ensuing from a blow which defendant seeks to justify as self-defense, his testimony that he only intended to hit the shoulder, and not the head, of

⁷⁷ Greer v. State, 53 Ind. 420; Ross v. State, 116 Ind. 495, 19 N. E. 451.

⁷⁸ Greer v. State, 53 Ind. 420; Brown v. State, 127 Wis. 193, 7 Ann. Cas. 258, 106 N. W. 536.

⁷⁹ White v. State, 53 Ind. 595. In this case the court said: "In a criminal case, the intent is a fact known to and peculiarly within the knowledge of the defendant, and we see no well-founded reason why he may not testify concerning it, as he might to any other fact of which he has knowledge.

Because the intent is a fact which cannot, in the nature of things, be positively known to others, and is hence a matter about which other witnesses cannot directly testify, does not, in our opinion, affect the rule above laid down as to the competency of the defendant in that respect."

⁸⁰ Norris v. Morrill, 40 N. H. 395.

⁸¹ People v. Baker, 96 N. Y. 340; Over v. Schiffing, 102 Ind. 191, 26 N. E. 91.

the deceased, is competent on the ground of justification, though incompetent as to his implied intent to kill by the blow.⁸² A person on trial for *assault with intent to murder* is competent as to the purpose for which he procured the instrument with which he committed the assault.⁸³ A defendant charged with murder may testify whether, at the time he discharged his pistol at the deceased, he did or did not believe that his life was in danger, or that he might receive great bodily harm, to show the condition of his mind, and to establish justification.⁸⁴ In a case where a note was attacked for usury, the court said: "The only remaining question arises upon the admission of the plaintiff's evidence as to what her intention was in stipulating for the extra compensation reserved, and here I cannot doubt the correctness of the ruling of the court. We have seen that the whole case was resolved into a question of fact for the jury, viz., What was the intention of the plaintiff in reserving this sum of \$21.50? Not, it must be observed, whether she intended to take usury; for the law defines what usury is, and whether it be taken intentionally or ignorantly is immaterial. But whether it was intended as compensation for the loan, or as compensation for trouble and expense incurred in collecting the money to be loaned, was precisely the question of fact for the

⁸² Commonwealth v. Woodward, 102 Mass. 155.

⁸³ Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Fenwick v. State, 63 Md. 239.

⁸⁴ Alexander v. State, 118 Ga. 26, 44 S. E. 851; State v. Harrington, 12 Nev. 126. The only states in which a contrary rule to that enunciated in the majority of the cases mentioned above is held to prevail, so far as we have been able to learn, are Alabama and Ohio. In the former state, the doctrine is well settled that the motive or intent with which an act is done or refused to be done is an inferential fact, to which a witness

cannot testify for want of the requisite knowledge; and the principle of the common law is extended to a party testifying as a witness for himself, because such evidence is not susceptible of contradiction: Alabama etc. Co. v. Reynolds, 79 Ala. 497; McCormick v. Joseph, 77 Ala. 236; Whizenant v. State, 71 Ala. 383; Burke v. State, 71 Ala. 377; Wheless v. Rhodes, 70 Ala. 419. The rule is there applied to civil and criminal cases alike, although the fact is recognized that a different doctrine prevails in nearly all of the remaining states of the Union.

jury; and the law is now well settled, under the rule admitting parties to testify in their own behalf, that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was. The answer to such question is, of course, not conclusive, but to be weighed and considered by the jury, with the other evidence in the case, in passing upon the question of actual interest.”⁸⁵ On a charge of *selling liquor* to minors, it was ruled that the question, “Did you intend to do that which the law prohibits?” would not have been improper. Before defendants in criminal cases were permitted to testify in their own behalf, there were no means of ascertaining the intent with which they did any particular act except as it could be inferred from the facts and circumstances attending it. The intent, however, was always a fact necessary to be established where it constituted an essential element in the crime charged. Now that defendants are permitted to testify in their own behalf, there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained. It is believed that there is no authority holding that they may not do so.⁸⁶ In an action for *libel*, the intent of the plaintiff in doing an act being material, it was proper to ask what it was.⁸⁷ In an action for slander it is proper to allow the defendant, both to show absence of actual malice for the purpose of avoiding exemplary damages, and under the defense of privileged communications, to testify as to whether or not she was actuated in anything she had said or done by any wish or desire or design or purpose to injure the plaintiff. Such testimony is competent and relevant, and not immaterial, although the jury or trial judge is not bound to

⁸⁵ *Thurston v. Cornell*, 38 N. Y. 281-287.

⁸⁶ *Ross v. State*, 116 Ind. 497, 19 N. E. 451. See, also, 7 *Crim. Law Mag.* 273; 22 *Cent. L. J.* 271; *Greer*

v. State, 53 Ind. 420; *White v. State*, 53 Ind. 595.

⁸⁷ *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91.

believe it.⁸⁸ In an action by the representatives of a deceased wife against the husband for the amount of a certificate of deposit in her name but kept by him, a statement of his intention to make a *gift* of it or otherwise is relevant.⁸⁹ The cases cited will be found to bear upon the occasions in most general use, but we append others in the note which will be found useful in support.⁹⁰

⁸⁸ *Fleet v. Tichenor*, 156 Cal. 343, 104 Pac. 458; *Bertelsen v. Bertelsen*, 7 Cal. App. 258, 94 Pac. 80; *Dorn v. Cooper*, 139 Iowa, 742, 16 Ann. Cas. 744, 118 N. W. 35. This case contains a very useful summary: 1. When intent, motive, or malice is directly in issue, a party may testify directly to his intent or purpose, and, if malice be involved, to his friendly feelings toward the other party. 2. But he cannot testify to another's intent, as that would be a mere inference or conclusion. 3. In a libel case it is held almost without exception that the defendant may testify to his lack of malice and that his feelings toward plaintiff were friendly both before and recently after the publication. 4. It follows that the objection to a question, in so far as it called for defendant's opinion regarding plaintiff's feelings toward him, should have been sustained; but, as the witness in answer gave simply his feelings toward plaintiff, no prejudice resulted.

⁸⁹ *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940; *McMahon v. Cronin*, 143 App. Div. 842, 128 N. Y. Supp. 423.

⁹⁰ *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 Pac. 512; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791; *Taylor v. People*, 21 Colo. 426, 42 Pac. 652; *Allen v. Hartford L. Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *Browning v. National Capital Bank*, 13 App.

Cas. (D. C.) 1; *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Toole v. Toole*, 107 Ga. 472, 33 S. E. 686; *Odin Coal Co. v. Denman*, 84 Ill. App. 190; *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91; *Tharp v. Thero*, 112 Iowa, 573, 84 N. W. 709; *State v. Lowe*, 67 Kan. 183, 72 Pac. 524; *Baker v. Missouri etc. R. Co.*, 85 Kan. 263, 116 Pac. 816; *Eve v. Saylor*, 19 Ky. Law Rep. 1697, 44 S. W. 355; *State v. Wright*, 40 La. Ann. 589, 4 South. 486; *Wheelden v. Wilson*, 44 Me. 11; *Ins. Co. v. Ritter*, 113 Md. 163, 77 Atl. 388; *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 62 L. R. A. 427; *Blaney v. Rogers*, 174 Mass. 277, 54 N. E. 561; *Bellows v. Crane Lumber Co.*, 129 Mich. 560, 89 N. W. 367; *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *McCormick Harvesting Mach. Co. v. Hiatt*, 4 Neb. (Unof.) 587, 95 N. W. 627; *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689; *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25; *Pinkham v. Benton*, 63 N. H. 226; *Davis v. Marvine*, 160 N. Y. 269, 54 N. E. 704; *Grever v. Taylor*, 53 Ohio St. 621, 42 N. E. 829; *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608, 103 Pac. 53; *Tucker v. Hendricks*, 25 Ohio C. C. 426; *Commonwealth v. Julius*, 173 Pa. 322, 34 Atl. 21; *Texas etc. R. Co. v. Plummer*, 57 Tex. Civ. App. 563, 122 S. W. 942; *Snell v. State*, 56 Tex. Cr. 246, 119 S. W. 852; *Peightal v. Cotton States Bldg. Co.*, 25 Tex. Civ. App. 390, 61 S. W. 429; *Conway v. Clinton*, 1 Utah, 215;

§ 171 (168). **Evidence made relevant by that of the adverse party.**—It frequently happens during the course of a trial that one of the parties, most frequently the defendant, gives some evidence which the plaintiff in such cases is entitled to rebut, but which he could not have offered in the original evidence to support his claim, and such matters of evidence are at the outset of the trial not within the four corners of the issues. To determine whether such questions are relevant or not the judge has to take into consideration not only the issues as shown by the pleadings, but also the line of proof which has been resorted to by the respective parties. Testimony which would be clearly irrelevant or incompetent if offered by one party in the first instance may become very pertinent in *rebuttal* or explanation of evidence offered by the adversary. Perhaps this is most frequently illustrated by cases arising under the rule elsewhere discussed,—that where *parts of a conversation* or act are proved, other connected parts should be received. Where part of conversation has been given in evidence, any other or further part thereof may be admitted in reply which would in any way explain or qualify the part first given. Thus, where the plaintiff, to show that his property had been applied to the defendant's use, in payment of a note, made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was plaintiff's, it was held that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt, and he was to pay it. The question then is, What is the rule of the limitation of this right? In Queen's Case, referred to in the notes, Abbott, C. J., in delivering the opinion of the court on certain questions proposed by the lords to the judges, said: "The conversa-

Crawford v. Joslyn, 83 Vt. 361, Ann. Cas. 1912A, 428, 76 Atl. 108; Sharpe v. Hasey, 141 Wis. 76, 123 N. W. 647; Barker v. Western Union Tel. Co., 134 Wis. 147, 126 Am. St. Rep.

1017, 14 L. R. A., N. S., 533, 114 N. W. 439; Moore v. May, 117 Wis. 192, 94 N. W. 45; Great Northern R. Co. v. McLaughlin, 70 Fed. 669, 17 C. C. A. 330.

tions of a party to the suit are, in themselves, evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit, because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on this occasion." The rule as thus stated was very broad, and was later restricted by Lord Denman, C. J., in *Prince v. Samo*, to which special reference is made in the note hereto.⁹¹ In such cases, although a plaintiff

⁹¹ *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337, to which is appended an exhaustive note on the subject to which we are indebted for the following extracts: The rule laid down in the leading case of *Prince v. Samo*, 7 Ad. & E. 627, 112 Eng. Reprint, 606, is that "where a statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible; and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a third party." The difference between the ruling in this case and that in *Queen's Case*, 2 Brod. & B. 297 (which related solely to the conversations of parties to the suits), was that in the latter case any of the re-

mainder of the conversation was admissible, "provided only that it related to the subject-matter of the suit"; while in the former, only such portion of the conversation was held admissible as qualified or explained what had been drawn out concerning the conversation by the other party. The court in *Prince v. Samo*, *supra*, expressly qualified *Queen's Case*, *supra*, and the rule laid down at that time has been generally followed in the courts since: 1 Greenl. Ev., § 467; Taylor on Evidence, 7th ed., § 733; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Noel v. State*, 161 Ala. 25, 49 South. 824; *Jones v. Fort*, 36 Ala. 449; *Thrall v. Smiley*, 9 Cal. 529; *Doonan v. Mitchell*, 26 Ga. 472; *Metzer v. State*, 39 Ind. 597, citing the principal case; *Gaddis v. Lord*, 10 Iowa, 141; *McIntyre v. Harris*, 41 Miss. 81; *Mullins v. Cottrell*, 41 Miss. 291; *Commonwealth v. Keyes*, 11 Gray (Mass.), 323; *Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049; *Carver*

might not in the first instance offer his own statements and thus make testimony in his own behalf, he may, if his statements are partially proved by the defendant's evidence, give the statement in full.⁹² The same rule

v. Tracy, 3 Johns. (N. Y.) 427; Wailing v. Toll, 9 Johns. (N. Y.) 141; McClave v. Maynard, 35 How. Pr. (N. Y.) 313; Root v. Brown, 4 Hun (N. Y.), 797; People v. Cox, 21 Hun (N. Y.), 50; Starin v. People, 45 N. Y. 340; Sturm v. Williams, 6 Jones & S. (N. Y.) 347; Misselbeck v. Greime, 2 Thomp. & C. (N. Y.) 660; Platner v. Platner, 78 N. Y. 103; Grattan v. Metropolitan L. I. Co., 92 N. Y. 274, 44 Am. Rep. 372; Robeson v. Schuylkill Nav. Co., 3 Grant Cas. (Pa.) 186; West Branch Bank v. Donaldson, 6 Pa. 179; Hais-ten v. Hixen, 3 Sneed (Tenn.), 691. In Garey v. Nicholson, 24 Wend. (N. Y.) 350, the rule was approved only so far as it applied to declarations of parties to the action. In a few cases the rule in Queen's Case, *supra*, has been followed: Clark v. Smith, 10 Conn. 1, 25 Am. Dec. 47; Dorlon v. Douglass, 6 Barb. (N. Y.) 451. The rule has been extended, as will be seen, beyond mere conversations to admissions in writing, such as letters, pleading, records, and the like. That is deemed to qualify admissions which rebuts or destroys the inference to be drawn from or affects the use to be made of them: Grattan v. Metropolitan L. I. Co., 92 N. Y. 274, 44 Am. Rep. 372. Among the latest cases on the subject are, Cedar Rapids Nat. Bank v. Carlson (Iowa), 136 N. W. 659 (explanation of erased signatures on a note); Security Bank of New York v. Finkelstein, 76 Misc. Rep. 461, 135 N. Y. Supp. 640 (explanation of new promise to avoid statute of limitations); Ogle v. Sidwell (Mo. App.), 149 S. W. 973 (explanation in action

for slander); Kirby v. Thompson, 138 Ga. 544, 75 S. E. 625 (in action for assault that defendant had paid a fine inflicted). See, also, Eastman v. Dunn (R. I.), 83 Atl. 1057; First Nat. Bank v. Harvey (S. D.), 137 N. W. 365. See, also, §§ 822, 871, *post*.

92 The whole or additional evidence cannot be introduced after part evidence of admissions, unless the latter makes it necessary that the other be introduced by way of explanation: Collins v. Johnson, Hempst. 279, Fed. Cas. No. 3015a; but the fact that evidence of the admissions, in the first place, was immaterial, will not cut off the other party from cross-examination concerning the remainder of the conversations or admissions: Ketchingham v. State, 6 Wis. 426; Lanier v. British Bank, 18 Ala. 625; Cabiness v. Martin, 4 Dev. L. (N. C.) 106. Where the conversation was not gone into save in a negative way to show that a certain thing was not spoken of, the rest of the conversation was held inadmissible: Platner v. Platner, 78 N. Y. 103. Where one puts in evidence the admissions of a party against himself, it is no objection to allowing in evidence the rest of what was said at the same time on the same subject, that the latter is favorable to the party offering it, though the party's declarations otherwise would not be admissible in his own favor: Chambers v. State, 26 Ala. 59; Hudson v. Howlett, 32 Ala. 478; Adkins v. Hershey, 14 Ark. 442; Moore v. Wright, 90 Ill. 470; State v. Martin, 28 Mo. 531; Garey v. Nicholson, 24 Wend. (N. Y.)

applies to *letters*. Where part of a letter has been read, other explanatory parts are admissible. Where a letter is read, to charge a party, his answer is held to be admissible in reply, under the rule which admits the whole of a conversation or transaction. So, where the reply to a letter is introduced, it is held that the other party may explain such answer by introducing the letter to which it was a reply.⁹³ Where a letter referred to a memorandum, and one party read the letter, to charge the other, it was held that the other might explain the letter by introducing the memorandum in evidence. Because one letter of a series, as in a letter copying-book, is admitted, this is not ground for admitting the whole series or book of letters. But where a defendant makes evidence of a number of a series of plaintiff's letters to charge him, this makes the whole series evidence for the plaintiff.⁹⁴ Where a *firm book* is used by a partner merely for the purpose of fixing a date, the entries of accounts in the book are not, therefore, admissible in evidence. But if a party wishes to avail himself of credits in a book of accounts, he cannot alone introduce the entries of such credits; the

350; *Crosbie v. Leary*, 6 Bosw. (N. Y.) 312; *Goodyear v. De la Vergne*, 10 Hun (N. Y.), 537; *Bearss v. Copley*, 10 N. Y. 93. But the rule when part of a conversation is introduced, the other party is entitled to the whole of it, does not apply to a case where a party seeks to introduce his own statements, in his own favor, made at a conversation with his own witness, to whose testimony the other party did not object: *State v. Elliott*, 15 Iowa, 72. Thus a party who has put in evidence the statement of a witness to himself cannot put in his answer to such statement, although the other side cross-examined the witness as to the statement: *Cook v. State*, 24 N. J. L. 843. So the rule as to conversations does not apply to conversa-

tions subsequent to the admission, and having no connection with the subject matter thereof: *Robinson v. Ferry*, 11 Conn. 460; *Straw v. Greene*, 14 Allen (Mass.), 206. Nor will it admit other conversations not referred to in the one put in evidence: *Barker v. Barker*, 16 N. H. 333.

⁹³ *Walker v. Griggs*, 28 Ga. 552; *Roe v. Day*, 7 Car. & P. 705; *Gibson v. Lacy*, 87 Ind. 202; *Lester v. Sutton*, 7 Mich. 329; *Livermore v. St. John*, 4 Rob. (N. Y.) 12; *Watson v. Moore*, 1 Car. & K. 626.

⁹⁴ *Barney v. Smith*, 4 Har. & J. (Md.) 485, 7 Am. Dec. 679; *Sturge v. Buchanan*, 2 Macl. & R. (Sc. App.) 90; *Zimmerman v. Huber*, 29 Ala. 379; *Raymond v. Howland*, 17 Wend. (N. Y.) 389.

whole book becomes evidence.⁹⁵ It is held that a party cannot read distinct and disconnected paragraphs in a *newspaper* because one has been read by his adversary.⁹⁶ If part of an *affidavit* or *deposition* is read in evidence, the remainder relative to the same matter may be read; but this does not necessitate nor does it authorize the whole to be read.⁹⁷ Where part of a *record* is offered in evidence by one party, it is held that the other may read the rest of it in evidence. So if part of a *pleading* is read or adopted to charge a party, he may offer the rest of it in *explanation*; for admissions in a pleading must be accepted as an entirety, but a portion having been used by the adversary, a party cannot use the rest of his pleading as *affirmative evidence* for himself.⁹⁸ On the same general principle where testimony is adduced against a party which tends to raise an inference of some *improper motive or conduct*, or when some act is shown which might be deemed prejudicial to his case, it may be relevant and important for him to give an explanation which might otherwise be clearly inadmissible.⁹⁹ Thus if the testimony raises the inference that a party has made improper advances to a witness, the whole facts and the language

⁹⁵ *Abbott v. Pearson*, 130 Mass. 191; *Veiths v. Hagge*, 8 Iowa, 163; *Piper v. White*, 56 Pa. 90.

⁹⁶ *Darby v. Ouseley*, 1 Hurl. & N. 1.

⁹⁷ *Forrest v. Forrest*, 6 Duer (N. Y.), 102; *Webster v. Calden*, 55 Me. 165; *Lynde v. McGregor*, 13 Allen (Mass.), 172; *Honstine v. O'Donnell*, 5 Hun (N. Y.), 474.

⁹⁸ *Moniotte v. Lieux*, 41 La. Ann. 528, 6 South. 817; *Haile v. Hill*, 13 Mo. 612; *Davis v. Forrest*, Fed. Cas. No. 3634, 2 Cranch C. C. 33; *State v. Hawkins*, 81 Ind. 486; *Pennell v. Meyer*, 2 Macl. & R. (Sc. App.) 98, 6 Car. & P. 470; *Bumpass v. Webb*, 1 Stew. (Ala.) 19, 18 Am. Rep. 34; *Davies v. Flewellen*, 29 Ga. 49; *Gildersleeve v. Mahony*, 5 Duer (N. Y.),

383; *Goodyear v. De la Vergne*, 10 Hun (N. Y.), 537; *Gunn v. Todd*, 21 Mo. 303, 64 Am. Dec. 231.

⁹⁹ *Richmond Co. v. Garner*, 91 Ga. 27, 16 S. E. 110; *Moniotte v. Lieux*, 41 La. Ann. 528, 6 South. 817; *Edgell v. Francis*, 86 Mich. 232, 48 N. W. 1095; *Merritt v. New York Ry. Co.*, 162 Mass. 326, 38 N. E. 447; *Foster's Exr. v. Dickinson*, 64 Vt. 233, 24 Atl. 253; *Mack v. State*, 48 Wis. 271, 4 N. W. 449. Thus courts have permitted explanation of the absence of witnesses: *Weatherford etc. Ry. Co. v. Duncan*, 88 Tex. 611, 32 S. W. 878; *Pease v. Smith*, 61 N. Y. 477; *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174; *Richmond v. Garner*, *supra*.

used may be shown in explanation.¹⁰⁰ If it is proved that a party has destroyed his account-books, he may state such reasons and facts as tend to repel the inference that they were destroyed from some improper motive.¹ On the principle under discussion, where a party introduces a witness who swears positively to an important fact and on full examination it appears that he can swear to this fact only as an *inference from the existence of another fact*—a custom or practice, for example—the other party may show that the pretended fact or practice so relied on as a basis of knowledge did not exist.² So where testimony is admitted tending to show that the facts claimed by a party are a physical impossibility, specific facts may be proved showing the contrary. In an action against a railroad corporation for the destruction of property by fire, one of the grounds of defense was, that no sparks of coal from the engine of the defendants could reach the premises of the plaintiff, so as to communicate fire. Bigelow, C. J., said: “To meet this position, it was certainly fit and apposite for the plaintiff to prove the physical possibility that fire could be so communicated, by showing that on a previous occasion the same engine, using the same species of fuel, had emitted burning sparks which fell within the inclosure of the plaintiff. Such evidence would have been open to question, if offered solely in support of the plaintiff’s case; but it was rendered relevant and material by the ground taken in defense. On the same ground, evidence concerning the emission of sparks from similar engines used on other roads was admissible.”³ Where a party has himself produced fragmentary parts of confidential communications he so far surrenders the privilege that the other party may offer the remaining parts. It would hardly be contended

¹⁰⁰ Lynch v. Coffin, 131 Mass. 311.

¹ Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881.

² Wentworth v. Eastern Ry. Co., 143 Mass. 248, 9 N. E. 563.

³ Ross v. Boston & Worcester R.

Co., 6 Allen (Mass.), 87, followed in Loring v. Worcester Ry. Co., 131 Mass. 469. See, also, Tuohy v. Columbia Steel Co., 61 Or. 527, 122 Pac. 36, as to alleged impossibility of attraction by magnet.

that a party could introduce extracts from communications as evidence in his own behalf for the purposes of the trial, and yet withhold other parts if their production were required by the opposite party. A party cannot waive such a privilege partially. He cannot remove the seal of secrecy from so much of the privileged communication as makes for his advantage, and insist that it shall not be removed as to so much as makes to the advantage of his adversary, or may neutralize the effect of such as has been introduced. Upon principle it would seem that it cannot be material at what stage of the proceedings in a suit a party waives his right to maintain the secrecy of a privileged communication. All the proceedings in the cause are constituent parts of the controversy, and it is not obvious how any distinction can obtain as to the effect of waiver when made by a party for the purpose of obtaining temporary relief and when made by him to obtain final relief.⁴ There is really no conflict upon this point, but it is sometimes referred to as being subject to opposite decisions. Those so-called conflicting decisions disclose merely that in those cases the necessity for the admission of the explanatory facts had not arisen, sufficient foundation not having been laid.⁵

§ 172 (169). Same—Rebuttal or explanation of irrelevant testimony.—In the preceding section we dealt with the admissibility of evidence which *per se* would have been

⁴ *Western Union Tel. Co. v. Baltimore etc. Tel. Co.*, 26 Fed. 55, 23 Blatchf. 419. Other cases illustrative of evidence *per se* inadmissible but made admissible by that of the adverse party are: *Tyler v. Todd*, 36 Conn. 218; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Chicago etc. R. Co. v. Ault*, 10 Ind. App. 661, 38 N. E. 492; *Chicago etc. Ry. Co. v. Emery*, 51 Kan. 16, 32 Pac. 631; *Owen v. Union etc. Co.*, 48 Mich. 348, 12 N. W. 175; *Clasen v. Pruhs*, 69 Neb. 278, 5 Ann. Cas. 112, 95 N. W. 640; *Reynolds v. Henrichs*, 16 S. D. 602, 94 N. W. 694; *Blair v. Sayre*, 29 W. Va. 604, 2 S. E. 97; *Maxwell Land etc. Co. v. Dawson*, 151 U. S. 586, 38 L. Ed. 279, 14 Sup. Ct. Rep. 458.

⁵ Of this class of cases the following are types: *Hathaway v. Trinkham*, 148 Mass. 85, 19 N. E. 18, and *Thompson v. Bowie*, 4 Wall. (U. S.) 463, 18 L. Ed. 423. See, also, useful digest of many others collected in 11 Am. & Eng. Ency. of Law, "Evidence," p. 515 et seq.

originally inadmissible, but which has been made relevant by the opposite party introducing a part of it and thus laying the foundation for the proper introduction of the remainder. There are other classes of irrelevant testimony which may also be used for a similar foundation. The decisions appear to arrange themselves into several divisions: 1. Where one party over the objection of the other introduces irrelevant testimony and objects to rebutting or explanatory testimony. 2. Where such irrelevant testimony is admitted without objection, and that where a party voluntarily offers irrelevant testimony, he cannot object to rebutting testimony. 3. Where a party permits irrelevant testimony on the part of his opponent to be admitted and claims to introduce similar testimony on his own. 4. Irrelevant evidence offered by consent of parties. 5. When a party seeks to introduce further irrelevant testimony of the same kind as and because of other similar irrelevant evidence already introduced by him. 6. And those which hold that the allowance of the introduction of countervailing immaterial evidence is within the discretion of the court, as is also the exclusion of irrelevant evidence admitted without objection. Dealing with these in their order we find: 1. If one party is allowed against objection to introduce irrelevant testimony, it is manifestly unjust to prevent the other party from rebutting or explaining such testimony. In a United States supreme court case⁶ where the issue was "mortgage or conveyance," the defendant gave evidence as to conversations at the time of the execution of the deed, and the plaintiff offered evidence in rebuttal, to which exception was taken. The court said: "Now, while this might have been improper as original testimony it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their versions of it. The defendant himself having thrown the bars down,

⁶ *Bogk v. Gassert*, 149 U. S. 17, 37 L. Ed. 631, 13 Sup. Ct. Rep. 738.

has evidently no right to object to the plaintiffs having taken advantage of the license thereby given to submit to the jury their understanding of the agreement.”⁷ 2. There is, however, a class of decisions which hold that if the *irrelevant testimony* is *not objected to* by the party against whom it is offered, he has no right to offer similar testimony against objection by way of explanation or rebuttal. When testimony of an immaterial statement made many years before the cause of action accrued was offered, Cowen, J., said: “All the bearing it could have had upon his credibility was no more than an insulated falsehood, not under oath, uttered years before, in regard to any other matter. It would neither weaken nor confirm the evidence as to fraud in the misreading by the bank agents, or the oral agreement, which by the misreading was sought to be evaded. When, therefore, at an ulterior stage of the cause, one party offered to show the truth and the other the falsity of the statement, the judge was under no obligation to hear the evidence offered on either side. It does not follow that, because irrelevant testimony has been given on one side, though without objection, the other has a right to give evidence in reply.”⁸ There are a few cases which are reported as going the length of putting it that the opponent has the right of introducing his immaterial evidence, despite objection, when similar evidence has been given against him over his objection, but they are in a min-

⁷ Ingram v. Wackernagel, 83 Iowa, 82, 48 N. W. 998.

⁸ San Diego Land Co. v. Neale, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; Union Steel etc. Co. v. Wagoner, 36 Colo. 375, 85 Pac. 836; Phelps v. Hunt, 43 Conn. 194; Stapleton v. Monroe, 111 Ga. 848, 36 S. E. 428; Maxwell v. Durkin, 185 Ill. 546, 57 N. E. 433; Shank v. State, 25 Ind. 207; Prevost v. Simeon, 4 La. 472; Gorsuch v. Rutledge, 70 Md. 272, 17 Atl. 76; Dodge v. Kiene, 28 Neb. 216, 44 N. W. 191; Hamblett v. Hamblett, 6

N. H. 333; Jewett v. Stevens, 6 N. H. 80; Farmers' etc. Bank v. Whinfield, 24 Wend. (N. Y.) 421; Swank v. Phillips, 113 Pa. 482, 6 Atl. 450; El Paso etc. Co. v. Eichel (Tex. Civ. App.), 130 S. W. 922; Wilkinson v. Jett, 7 Leigh (Va.), 115, 30 Am. Dec. 493; Stringer v. Young, 3 Pet. (U. S.) 320, 7 L. Ed. 693; Cowen v. Hill's Notes to Phil. Ev., p. 430 et seq. But the rule does not apply where there was no opportunity to object: People v. Barone, 161 N. Y. 451, 55 N. E. 1083.

ority as contrasted with the great weight of authority to the contrary, and an examination will show there is no positive statement to that effect in them. The so-called right is invariably the right to put in the whole conversation, act or document of which a part is already in evidence even over objection, but they do not contain any such proposition as the right of one party to counteract improperly admitted evidence by other irrelevant evidence sought to be improperly admitted on that account.⁹ There are also decisions which hold that where a party voluntarily offers testimony which is unnecessary or irrelevant to the issue, it is too late for him to object to rebutting testimony offered by the adversary upon the same subject, and that it should be received.¹⁰ 3. As the view has been stated, a party cannot, by permitting irrelevant evidence to be introduced, rightfully claim that because of such fact similar evidence can be introduced by him. In an action of ejectment¹¹ the plaintiff had been permitted to introduce irrelevant evidence in support of his claim, and the defendant sought to introduce official copies of entries made since the date of plaintiff's grant for the purpose of proving, among other things, a general opinion that the land was vacant at the date of such entries. Marshall, C. J., referring to the evidence of the plaintiff, said: "This

⁹ *Havis v. Taylor*, 13 Ala. 324; *Richardson v. Hoole*, 13 Nev. 492; *Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77; *Gosnell v. Webster*, 70 Neb. 705, 97 N. W. 1060; *Buedingen Mfg. Co. v. Royal Trust Co.*, 90 App. Div. 267, 85 N. Y. Supp. 621; *Aldous v. Olverson*, 17 S. D. 190, 95 N. W. 917; *McConnell v. Combination etc. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

¹⁰ *Pollak v. Gunter*, 162 Ala. 317, 50 South. 155; *Kuhn v. Eppstein*, 239 Ill. 555, 88 N. E. 174; *Bowen v. Eaton*, 46 Ind. App. 65, 89 N. E. 961; *Brown v. Perkins*, 1 Allen (Mass.), 89; *Scattergood v. Wood*, 79 N. Y.

263, 35 Am. Rep. 515; *Sherfey v. Evansville Ry. Co.*, 121 Ind. 427, 23 N. E. 273; *Spaulding v. Railway Co.*, 98 Iowa, 205, 67 N. W. 227; *Dodge v. Kiene*, 28 Neb. 216, 44 N. W. 191; *McIntyre v. White*, 124 Ala. 177, 26 South. 937; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721; *McElheny v. Pittsburg Ry. Co.*, 147 Pa. 1, 23 Atl. 392, where the objecting party introduced the subject on cross-examination; *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385.

¹¹ *Stringer v. The Lessee of Young*, 3 Pet. (U. S.) 320, 7 L. Ed. 693.

testimony was undoubtedly irrelevant, and had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error." The learned chief justice thus referred to the offered testimony for the defense: "The defendant, however, has not taken this course; but has chosen to repel the testimony by other evidence, which was clearly inadmissible. Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion. It is unnecessary, because the testimony rejected by the court is not of this character. Entries made subsequent to the plaintiff's grant by others can have no tendency to disprove the evidence of notice by the defendant when its entries were made."¹² 4. The court is not bound to receive irrelevant testimony even though *both parties consent*.¹³ 5. Where a party has offered irrelevant testimony without objection, he cannot claim the right to introduce further evidence of the same kind to explain the former. In a New Jersey case,¹⁴ the court refused to compel a witness to answer certain questions. This witness had been sued by this same plaintiff, for the same slander. He testified that he had settled the action, and a paper being handed to him by the counsel of the plaintiff, he said it contained

¹² Manning v. Railway Co., 64 Iowa, 240, 20 N. W. 169; Phelps v. Hunt, 43 Conn. 194; Wickenkamp v. Wickenkamp, 77 Ill. 92; Maxwell v. Durkin, 185 Ill. 546, 57 N. E. 433; People v. Dowling, 84 N. Y. 478. Clearly so where the proffered testimony does not tend to disprove that so received:

Gorsuch v. Rutledge, 70 Md. 272, 17 Atl. 76. The same rule holds where the testimony is incompetent: McCartney v. Territory, 1 Neb. 121.

¹³ Farmers' Bank v. Winfield, 24 Wend. (N. Y.) 421.

¹⁴ Brand v. Longstreet, 4 N. J. L. 325.

the terms of settlement; and being asked if he had not received money from the plaintiff to induce him to settle, he refused to answer, and the court supported him in this refusal. And, said the court, "I think the court acted correctly. The whole testimony was irrelevant and improper, and ought to have been rejected. The only doubt which I entertained on this subject was, whether the court ought not, after the paper was read, to have admitted a full examination of the witness on this point, or to have overruled what was given in; and perhaps the most expedient course would have been to have overruled what had been admitted. But of this the defendant cannot complain. It was his testimony offered by himself, and neither solicited nor objected to by the plaintiff. The bill of exceptions presents the defendant in the singular position of introducing, without opposition, some testimony which was illegal, and then, because the court would not permit him to introduce more illegal evidence, taking exception against that which he had already offered." 6. There is another class of decisions which hold that the introduction or exclusion of immaterial evidence to meet immaterial evidence is within the *discretion* of the presiding judge. In a writ of entry to recover a parcel of land in Boston,¹⁵ the tenant, upon cross-examination of the demandant, made inquiries respecting certain proceedings before the auditor and the finding of the auditor in those proceedings, apparently for the purpose of showing that one item was improperly charged, and was not allowed by the auditor. This evidence was immaterial and irrelevant to the issue on trial; but it was introduced by the tenants. The court said: "It was clearly within the discretion of the presiding judge to allow the demandant to put in the auditor's report, to meet any inference which might be drawn from the cross-examination. The introduction or exclusion of immaterial evidence to meet immaterial evidence is within the discretion of the court. The report having been thus

¹⁵ Treat v. Curtis, 124 Mass. 348.

admitted, there is no ground for exception, unless the presiding judge refused to limit its application. It does not appear that he did, or that any instructions on this point were requested, and we must presume that proper instructions were given."¹⁶ Where such testimony has been received without objection, it is not error for the court to exclude it from the consideration of the jury.¹⁷

§ 173 (170). General rules as to relevancy.—There is no more familiar principle in the law of evidence than this, that if the testimony proposed is relevant and is not forbidden by some one of the exclusionary rules of evidence, it should be received,¹⁸ or, as Thayer puts it, "unless

¹⁶ *Brooks v. Acten*, 117 Mass. 204; *Hathaway v. Evans*, 113 Mass. 264. And it is very clear that it is no ground for granting a new trial, that improper evidence was admitted on the side of the plaintiffs merely to meet evidence which ought not to have been admitted on the other side: *Grafton Bank v. Woodward*, 5 N. H. 301; *Furbush v. Goodwin*, 25 N. H. 425; *Morgan v. State*, 88 Ala. 223, 6 South. 761; *Sherwood v. Titman*, 55 Pa. 77.

¹⁷ *Curtis v. Parker*, 136 Ala. 217, 33 South. 935; *Little Rock etc. R. Co. v. Tankersley*, 54 Ark. 25, 14 S. W. 1099; *Lutton v. Town of Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589 (in which case the testimony was excluded at the request of the party offering it); *Farmers' High Line Canal etc. Co. v. White*, 32 Colo. 114, 75 Pac. 415; *Jefferson Min. Co. v. Anchoria-Leland Min. etc. Co.*, 32 Colo. 176, 64 L. R. A. 925, 75 Pac. 1070; *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201, 68 N. E. 1101; *Chicago etc. R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882; *Cronk v. Wabash R. Co.*, 123 Iowa, 349, 98 N. W. 884; *Ingram v. Wackernagel*, 83 Iowa, 82,

48 N. W. 998; *Corley v. Lancaster*, 81 Ky. 171, 5 Ky. Law Rep. 39; *Mousseau v. Thebens*, 19 La. Ann. 516; *Treat v. Curtis*, 124 Mass. 348; *McNaughton v. Smith*, 136 Mich. 368, 99 N. W. 382; *Johnson v. Doon*, 131 Mich. 452, 91 N. W. 742; *Baker v. Pulitzer Pub. Co.*, 103 Mo. App. 54, 77 S. W. 585; *Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77; *Pettis v. Green River Asphalt Co.*, 71 Neb. 513, 99 N. W. 235, 101 N. W. 333; *Clasen v. Pruhs*, 69 Neb. 278, 5 Ann. Cas. 112, 95 N. W. 640; *Furbush v. Goodwin*, 25 N. H. 425; *McCormack v. Mandelbaum*, 102 App. Div. 302, 92 N. Y. Supp. 425; *Waldron v. Romaine*, 22 N. Y. 368; *Cabiness v. Martin*, 15 N. C. 106; *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Shannon v. Castner*, 21 Pa. Super. Ct. 294; *Aldous v. Olverson*, 17 S. D. 190, 95 N. W. 917; *Missouri etc. R. Co. v. Criswell*, 34 Tex. Civ. App. 278, 78 S. W. 388; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697; *McNicol v. Collins*, 30 Wash. 318, 70 Pac. 753; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805; *Evening Post Pub. Co. v. Voight*, 72 Fed. 885, 19 C. C. A. 224.

¹⁸ This is illustrated by most of the cases cited in this section. Such tes-

excluded by some rule or principle of law, all that is logically probative is admissible"; and, he continues: "The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."¹⁹ For convenience of reference we give here the four main groups of these exclusionary rules of evidence, which are hereinafter discussed: 1. *Res inter alios acta*—facts similar to but not specifically connected with each other. 2. *Hearsay*—the fact that a person not called as a witness has asserted the existence of any fact. 3. *Opinion*—the fact that any person is of opinion that a fact exists. 4. *Character*—the fact that a person's character is such as to render conduct imputed to him probable or improbable. To each of these four exclusive rules there are, however, important exceptions, which are defined by the law of evidence.²⁰ It is not a sufficient objection that the evidence proposed is of little weight, since that is a matter addressed solely to the jury; nor is the proposed testimony to be necessarily rejected because it may not bear directly upon the issue. As has frequently been said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.²¹ The competency of a collateral fact to be used as the basis of legitimate argument, is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination

timony should be received even though obtained by improper means: Cluett v. Rosenthal, 100 Mich. 193, 43 Am. St. Rep. 446, 58 N. W. 1009.

¹⁹ Thayer, Prel. Treat. on Ev., 265.

²⁰ Reynolds' Steph. on Ev., Stephen's Introduction, xviii.

²¹ Holmes v. Goldsmith, 147 U. S. 150, 37 L. Ed. 118, 13 Sup. Ct. Rep. 288; 1 Stark. Ev., 47, 48.

probably founded in truth. Indeed, to require a necessary relation between the fact known and the fact sought, would sweep away many sources of testimony to which men daily recur in the ordinary business of life, and that cannot be rejected by a judicial tribunal, without hazard of shutting out the light. Merely foreign matter must be avoided; but, though in appearance foreign, if it bear at all on the main subject, it must be heard. As an illustration of this rule, we may take the ordinary case of an indictment for knowingly uttering counterfeited bank notes, in which proof of the possession or of the prior or subsequent utterance of other simulated notes, *though of a different description*, is constantly admitted as material to the question of guilty knowledge, touching the subject of the indictment.²² In another case, where the question was as to the date of a receipt, given by the plaintiff to the defendant for money paid by the latter to the former, evidence that the defendant had, on a certain day, alleged by the plaintiff to be the date of the receipt in question, received from another source a sum of money, was held to be relevant.^{22a} And yet there was, in these instances, no necessary or even intimate relation between the ascertained facts and the conclusion sought; but the former suggested reasons favoring the respective hypotheses of the prosecution and of the defendant, and this was deemed enough to authorize their introduction to the jury. If it forms a link in the chain of testimony²³ or *tends in any degree to establish the fact* in controversy, it should be received.²⁴

²² *Stevenson v. Stewart*, 11 Pa. 307; *Sanders v. Stokes*, 30 Ala. 432; *Belden v. Lamb*, 17 Conn. 441; *Sample v. Lipscomb*, 18 Ga. 687; *Slack v. McLagan*, 15 Ill. 242; *Farwell v. Tyler*, 5 Iowa, 535; *Trull v. True*, 33 Me. 367; *Richardson v. Milburn*, 17 Md. 67; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Tucker v. Peaslee*, 36 N. H. 167; *Fitzwater v. Stout*, 16 Pa. 22. In *Isbell v. New York Ry. Co.*, 25 Conn. 556, the qualities of an ob-

ject were allowed to be shown by comparison thereof with the known qualities of an object not in dispute.

^{22a} *Armstrong v. Burrowes*, 6 Watts (Pa.), 266.

²³ *Hunter v. Harris*, 131 Ill. 482, 23 N. E. 626; *Tams v. Bullitt*, 35 Pa. 308; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359, 17 L. Ed. 642; *Remy v. Olds* (Cal.), 34 Pac. 216.

²⁴ *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Johnson v. State*, 14 Ga.

But since the court is compelled to rule upon the admission of testimony when it is offered, the offer of the evidence should contain information as to the manner in which the evidence is to become relevant. Dislocated circumstances may, doubtless, be given in evidence, particularly, if there be no objection to the order of time; but the proposal of the evidence must contain, in itself, by reference to something that has preceded it, or that is to follow, information of the manner in which the evidence is to be legitimately operative.²⁵ Although the evidence may be *irrelevant for one purpose*, it may be *relevant as to other facts* in issue; and, if so, it should be received; but in such case it is proper that the court should explain to the jury the purpose for which it is admitted and restrict its application. If evidence tends to prove two things, one of which is proper and the other improper, it must go to the jury with an explanation from the court of its legitimate bearing.²⁶ But if the testimony is *legally insufficient* for the purpose for which it is offered it may be properly *rejected*. So testimony which is competent as to *one party* should not be excluded because not competent against another party to the suit. In such case the effect of the evidence may be limited by proper instructions.²⁷ Sometimes it becomes the duty of the court to exclude entirely relevant evidence, as, for instance, the limitation of the number of witnesses who can only prove the same fact over and over again, or who are only called to prove some fact which is already in evidence by proof or is admitted by

55; Colglazier v. Colglazier, 124 Ind. 196, 24 N. E. 95; People v. Hare, 57 Mich. 505, 24 N. W. 843; Cleveland C. C. & I. Ry. Co. v. Closser, 126 Ind. 348, 22 Am. St. Rep. 593, 9 L. R. A. 754, 26 N. E. 159; Copp v. Hardy, 32 Mo. App. 588; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452.

²⁵ Weidler v. Farmers' Bank, 11 Serg. & R. (Pa.) 134; McCurry v.

Hooper, 12 Ala. 823, 46 Am. Dec. 280; Austin v. Robertson, 25 Minn. 431.

²⁶ Webster v. Enfield, 10 Ill. 298; Brewin v. Farrell, 39 Vt. 206; McClelland v. Lindsay, 1 Watts & S. (Pa.) 360; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92; Head v. Selleck, 76 Conn. 706, 57 Atl. 281.

²⁷ Owens v. State, 94 Ala. 97, 10 South. 669.

the opposite party.²⁸ Whilst it is not at all times easy to see the exact bearing of evidence offered upon the issue between the parties, it is sometimes difficult to say that it is so utterly irrelevant that it may mislead the jury and should for that cause be excluded. Evidence may seem not to bear immediately and directly upon the contested matters of fact in the cause, yet it may serve to illustrate the conduct of a party by throwing light upon the *motives* by which he may have been prompted; and where this is a material inquiry, if the evidence tend to do this in any degree, it ought not to be rejected, although the court may think it not entitled to great weight with the jury.²⁹ It

28 *Olmstead v. Hill*, 2 Ark. 346; *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 38; *Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242; *Waller v. Graves*, 20 Conn. 305; *White v. Columbus Iron Works Co.*, 113 Ga. 577, 38 S. E. 944; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385; *Farmers' etc. Bldg. etc. Assn. v. Rector*, 22 Ind. App. 101, 53 N. E. 297; *Duggan v. Ryan*, 211 Ill. 133, 71 N. E. 848; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Russell v. Sycamore Marsh Harvester Mfg. Co.*, 65 Ill. 333; *Glidden v. Dunlap*, 28 Me. 379; *State v. Trimble*, 104 Md. 317, 64 Atl. 1026; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Arnold v. Harris*, 142 Mich. 275, 105 N. W. 744; *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880; *Norris v. Clarke*, 33 Minn. 476, 24 N. W. 128; *Cole v. Curtis*, 16 Minn. 182; *Richardson v. Issaquena County Bd. Levee Comrs.*, 68 Miss. 539, 9 South. 351; *Wilson v. Williams*, 52 Miss. 487; *Steltemeier v. Barrett*, 145 Mo. App. 534, 122 S. W. 1095; *Grant v. Hathaway*, 118 Mo. App. 604, 96 S. W. 417; *Craighead v. Wells*, 21 Mo. 404; *Arabian Horse Co. v. Bivens*, 4 Neb. (Unof.) 823, 96 N. W. 621; *Allendorph v. Wheeler*, 101

N. Y. 649, 5 N. E. 42; *People v. New York Super. Ct.*, 10 Wend. (N. Y.) 285; *White v. Old Dominion Steamship Co.*, 102 N. Y. 661, 6 N. E. 289; *Cunningham v. Smith*, 70 Pa. 450; *Stallings v. Hullum*, 79 Tex. 421, 15 S. W. 677; *Bartlett v. Hubert*, 21 Tex. 8; *Wait v. Brewster*, 31 Vt. 516; *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525; *Austin v. Austin*, 45 Wis. 523. In *Steltemeier v. Barrett*, *supra*, error was alleged in excluding a letter addressed by counsel on one side to counsel on the other as to submitting a paper which was in controversy to an examination outside, or even inside, of court. The court of appeal said that an examination outside the court was not in the control of the court in a case of this kind, and, as the examination of that very paper could be made in the presence of the court, and the paper was in evidence before the jury, and was submitted to the inspection of the jury, counsel certainly had all the advantage of any disclosure or fact which an examination might reveal.

29 *Parsons v. Hooper*, 16 Gratt. (Va.) 64, and cases cited to § 170, *ante*.

is not always necessary that evidence should *appear at the time to be relevant*. It is sometimes impossible to anticipate exactly what questions may arise in the course of the trial; and testimony should be received if it would be relevant and competent in view of the questions which may be reasonably expected to arise upon the issue joined. Testimony may be offered not manifestly applicable to the matter in controversy, but should not therefore be rejected, if its applicability appears to be susceptible of proof by evidence *aliunde*. If it were otherwise, no case depending upon the coincidence of a series of independent facts could ever be made out by proof. Isolated from the others, each fact in such case might appear wholly inapplicable; combined, their application would be manifest; and yet they must necessarily be introduced in evidence singly. The question of the relevancy of such evidence, therefore, remains to be considered in connection with the suppletory and correlative evidence introduced. If no testimony be introduced tending in any way to show its applicability, the court should, on motion of the party against whom it was offered, exclude it from the jury or instruct them to disregard it. But if there be additional evidence tending to show the relevancy of that in aid of which it was offered, it becomes the peculiar province of the jury to judge of its sufficiency to subserve its intended purposes.³⁰ "It is

³⁰ *Crossett v. Whelan*, 44 Cal. 200; *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44; *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632; *Mosely v. Gordon*, 16 Ga. 384; *Bedell v. Janney*, 4 Gilm. (Ill.) 193; *Wilson v. Wilson*, 86 Ind. 472; *Peterson v. Walter A. Wood Mowing etc. Mach. Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96; *State v. McAllister*, 24 Me. 139; and see *Birmingham Ry.*

etc. Co. v. Girod, 164 Ala. 10, 137 Am. St. Rep. 17, 51 South. 242; *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427; *Campbell v. Sherman*, 49 Mich. 534, 14 N. W. 484; *Woodbury v. Larned*, 5 Minn. 339; *McDermott v. Judy*, 67 Mo. App. 647; *Ponca v. Crawford*, 18 Neb. 551, 26 N. W. 365; *Place v. Minster*, 65 N. Y. 89; *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49; *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222; *Eisenhart v. Slaymaker*, 14 Serg. & R. (Pa.) 153; *Perry v. Jeffries*, 61

the right of the party, when he offers evidence in its proper order, which proves, or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is, that it will be followed by such other proof as is necessary for its proper connection; and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the court is being trifled with, it may be proper to call upon counsel to state the connection, which they expect to give the proposed evidence, but this would ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party. It may sometimes happen that evidence is offered so out of its proper place as to authorize the court to exclude it for want of a proper foundation."³¹ It is the general rule that it should be left to the *discretion* of the presiding judge to determine whether he will require proof of connecting or preliminary facts before deciding the question of relevancy, or whether he will admit the testimony on the statement of counsel that he expects to show the relevancy by other facts.³² It often happens that certain preliminary questions of fact must be deter-

S. C. 292, 39 S. E. 515; *Sweat v. Rogers*, 6 Heisk. (Tenn.) 117; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Harris v. Holmes*, 30 Vt. 352; *Wausau First Nat. Bank v. Conway*, 67 Wis. 210, 30 N. W. 215; *Metropolis Bank v. Gutschlick*, 14 Pet. (U. S.) 19, 10 L. Ed. 335. See § 135 et seq., *ante*.

³¹ *Rogers v. Brent*, 5 Gilm. (Ill.) 573, 50 Am. Dec. 422; *Doe ex dem. Davenport v. Roe*, 27 Ga. 68; and see § 141, *ante*. See note on "Withdrawal of Unreasonable Testimony from Consideration of Jury," *Wolfe v. City etc. Railway Co.*, 15 Ann. Cas. 1187.

³² *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Mc-*

Kee v. Bassick Min. Co., 8 Colo. 392, 8 Pac. 561; *Hammond v. Hammond Buckle Co.*, 72 Conn. 130, 44 Atl. 25; *Dougherty v. Welch*, 53 Conn. 558, 5 Atl. 704; *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44; *Italian-Swiss Agriculture Colony v. Pease*, 194 Ill. 98, 62 N. E. 317; *Haller v. Gibson*, 30 Ind. App. 10, 65 N. E. 293; *Leipird v. Stotler*, 97 Iowa, 169, 66 N. W. 150; *Warner v. Hardy*, 6 Md. 525; *Gage v. Averill*, 57 Mo. App. 111; *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650; *Bayliss v. Cockroft*, 81 N. Y. 363; *Downing v. DeKlyn*, 1 E. D. Smith (N. Y.), 563; *State v. Cherry*, 63 N. C. 493; *Earl v. Tupper*, 45 Vt. 275; *Hagan v. McDermott*, 134 Wis. 490, 115 N. W. 138.

mined before it can appear whether the proffered testimony is relevant or competent. In such cases the duty devolves upon the *trial judge to decide such preliminary matters* of fact without the assistance of the jury.³³ When the party gives the promise to make the disjointed testimony relevant by subsequent proper location, it is necessary for him to state what the subsequent evidence will be, and if he fails to give such explanation the court may exclude the offered testimony and decline the undertaking.³⁴ It sometimes happens, however, that the fact upon which the admissibility of evidence depends is a material and *issuable fact* in the case; for example, the admissibility of a deed may depend upon whether it has been executed, that being a material disputed fact. In such cases the judge does not decide the preliminary issue peremptorily, but submits the testimony tending to prove such fact to the jury, leaving it to them to pass upon its weight.³⁵ Proof

³³ Commonwealth v. Coe, 115 Mass. 481; as to admissibility of confessions, State v. Carson, 36 S. C. 524, 15 S. E. 588; as to the privilege or competency of a witness, Childs v. Merrill, 66 Vt. 302, 29 Atl. 532. See, also, § 796, *post*. As to admissibility of documents, Commonwealth v. Coe, 115 Mass. 481. See, also, § 174, *post*.

³⁴ Abbott's Trial Brief, Civil Jury Trials, 238, which cites the following cases: Mechelke v. Bramer, 59 Wis. 57, 17 N. W. 682; Piper v. White, 56 Pa. 90; Hall v. Patterson, 51 Pa. 289; Bilberry v. Mobley, 21 Ala. 277; Van Buren v. Wells, 19 Wend. (N. Y.) 203; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491, and cases cited; Carnes v. Platt, 15 Abb. Pr., N. S., 337, 4 Jones & S. 361; affirmed in 59 N. Y. 405; Boland v. Louisville & N. R. Co., 106 Ala. 641, 18 South. 99; Holman v. Boston Land & Security Co., 8 Colo. App. 282, 45 Pac. 519; McAllister v. Barnes, 35 Mo. App. 668.

³⁵ The rule is very clearly laid down by Chief Justice Marshall in Swearingen v. Leach, 7 B. Mon. (Ky.) 287. He says: "If the fact on which the relevancy of the disputed evidence depends be merely preliminary, and not otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may perhaps in all cases be proper to make the admissibility of the disputed evidence depend upon the judge's opinion as to the sufficiency of the proof to establish the preliminary fact. But where the preliminary fact is otherwise material in the cause, and essentially involved in the issue, the general practice is, to admit the dependent evidence, if in the opinion of the judge there be evidence conducing to prove the preliminary fact, and from which a jury might rationally infer it. A contrary practice would in many instances, as in this, take the whole case from the jury, and subject it to the decision of the

necessary to establish the admissibility of evidence which a party wishes to give should first be addressed to the court, and when clear and uncontradicted, the court will decide the question, but if doubtful, it is proper to submit the matter to the jury to let them decide the doubt, when such doubt depends upon a question of fact.³⁶ The general rule is that it is for the court to determine all questions relating to the admissibility of evidence; and when this question of admissibility depends upon the decision of other questions of fact, such as the execution of a contract or agreement, these preliminary facts are, in the first instance, to be tried by the judge; but as above stated, he may, at his discretion, take the opinion of the jury upon them. Often these preliminary questions are mixed questions of law and fact; or the evidence may be conflicting as to whether the instrument was in fact executed or delivered by the parties; in which case it is proper to submit the question to the jury under proper instructions from the court. It is enough to authorize such submission to the jury that there is some proof of the facts on which the

judge upon the weight of the evidence, thus destroying the established distinction between their respective functions. When it is necessary to prove a deed, and the instrument is admitted to be read to the jury, upon evidence conducing to prove its execution, could a judge afterward exclude it on motion, on the ground that the proof of its execution was not fully satisfactory to his mind, or could he have rejected it on this ground, even in the first instance? The execution of the deed being the material fact in the issue, the judge does not decide it peremptorily, though it is in one aspect a preliminary fact, but having decided that there is evidence conducing to prove it, he places the whole question of fact before the jury. We are satisfied that in this and similar cases where the relevancy of one fact de-

pends upon another material fact in the cause, the admissibility of evidence in support of the dependent or secondary fact depends not upon the absolute proof of the principal fact, but upon there being such evidence as conduces to prove it, and would authorize the jury to find it."

³⁶ *Dement v. Stonestreet*, 1 Md. 123; *Trasher v. Everhart*, 3 Gill & J. (Md.) 242; *Funk v. Kincaid*, 5 Md. 404; *Winslow v. Bailey*, 16 Me. 319; *Bartlett v. Hoyt*, 33 N. H. 151; *Hall v. Brown*, 58 N. H. 93; *Davis v. Charles River etc. Co.*, 11 Cush. (Mass.) 506. See, also, *Day v. Sharp*, 4 Whart. (Pa.) 339; 34 Am. Dec. 509; *Emerson v. Prov. Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Porter v. Wilson*, 13 Pa. 641; 1 *Thomp. Trials*, § 676; *Abbott's Trial Brief*, Civil Jury Trials, c. 10.

right to admit the evidence is predicated.³⁷ It is often the case that the main question in controversy is the execution and authenticity of the instrument. And the rule is, that if there be no evidence of authenticity, the instrument cannot be read to the jury; but if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision.³⁸ And when a *prima facie* case of execution has once been made, the court is not to allow the other party to adduce counter-proof before the instrument is read, and thus assume to take the question from the jury.³⁹ When the preliminary question of fact is for the judge, his decision must be final, if there is any proper evidence to support it. As in all questions of that nature, exceptions to the ruling at the trial will be sustained only when they show clearly that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.⁴⁰ The admission of testimony which at the time is irrelevant is *cured* by the subsequent admission of proper testimony which shows the former to be admissible.⁴¹ It is a familiar rule which may be implied from all the authorities cited in this section that if the evidence proposed is clearly *irrelevant* it should be *rejected*. And the judge may reject such evidence on his own motion, whether objected to or not.⁴² When a mistake has been made in the admission of evidence on the trial of a cause, it may subsequently be rectified. It may be withdrawn by the party who has given it, or the court may withdraw it, and positively in-

³⁷ 1 Greenl. Ev., § 49.

³⁸ 2 Phillips' Ev., C. H. & E.'s Notes, 503, note.

³⁹ Verzan v. McGregor, 23 Cal. 339.

⁴⁰ Commonwealth v. Coe, 115 Mass. 481; Doud v. Hall, 8 Allen (Mass.), 410; Quinsigamond Bank v. Hobbs, 11

Gray (Mass.), 250; Foster v. Mackay, 7 Met. (Mass.) 531.

⁴¹ Scott v. State, 30 Ala. 503; Bell v. Chambers, 38 Ala. 660; Tilton v. Tilton, 41 N. H. 479.

⁴² Cooper v. Barber, 24 Wend. (N. Y.) 105. See, also, Dunnigan v. Ellis, 162 Ill. App. 185.

struct the jury to disregard it—to discard it from their view. In such a case, it is the duty of the court to see to it that no mischief is done; that the illegal evidence be withdrawn, wholly withdrawn, and withdrawn for every purpose, and that parties are protected against the disastrous effects of the admission of illegal evidence. To state the rule more broadly—where illegal testimony has been admitted by the court against objection, nothing short of a direct and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission.⁴³ Other rules as to relevancy will be found throughout this chapter, but we have recapitulated those which have appeared to us the most likely to call for quick consideration and which by reason of their interconnection with other general rules require, in addition, that clear conception of the admissibility of evidence which so often regulates the result of an action, and without which knowledge a verdict becomes a thing of chance in place of a logical result from well-founded premises.

§ 174 (171). **Province of judge and jury.**—From the prefatory remarks the reader will have gathered that we shall refrain from touching upon either the historical side of the great territory occupied under a sort of joint tenancy by the court and the jury or the scientific aspect which deals with the necessary adjustment of their respective powers. We have to concern ourselves with their properties of to-day, and even restrain ourselves from any inquiry as to the how or why of their divided and yet interdependent functions. It is a delight to follow the learned ramblings of a scholar like Thayer, who illuminates his historical paintings with the colors of an old master; but what the practicing lawyers of bench and bar desire to know for the purpose of doing the business of the community is, whether there is a rule that the judge attends to the law and the jury to the facts of the case, and is it to be

⁴³ Carlisle v. Hunley, 15 Ala. 623; Ware etc. Canal Co. v. Barnes, 31 Pa. Florey v. Florey, 24 Ala. 241; Dela- 193.

taken in its entirety, and if not, how is it to be interpreted? Like many fellow-statements, proverbs, saws, and maxims, whose origin is of little moment, we recognize that such a rule was supposed to have been created for the purpose of distinguishing between the important functions referred to. Likewise we know that it does not do so and that it is "more honored in the breach than in the observance." Hence we find that while it is a familiar rule that the judge is to determine all questions of law that arise in the trial of a case and that the jury are to find the facts from the evidence introduced, as a matter of fact judges frequently decide questions of fact and jurors apply the law as given by the court to the questions of fact involved. It is our purpose here to set out the functions which are now assigned to these two important branches of the judicial system in their relation to the laws of evidence. In the first place, the *judge* passes upon the admissibility, materiality or relevancy of the evidence offered;⁴⁴ the *jury* decide upon the weight of that evidence.⁴⁵ The *judge*

⁴⁴ De Graffenreid v. Thomas, 14 Ala. 681; People v. Ivey, 49 Cal. 56; Robinson v. Ferry, 11 Conn. 460; Sullivan v. Honacker, 6 Fla. 372; Carroll v. Roberts, 23 Ga. 492; Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277; Indiana Farmers' Livestock Ins. Co. v. Byrket, 9 Ind. App. 443, 36 N. E. 779; Swearingen v. Leach, 7 B. Mon. (Ky.) 285; United R. etc. Co. v. Corbin, 109 Md. 442, 72 Atl. 606; Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Hansberger v. Sedalia Electric R. Co., 82 Mo. App. 566; Theobald v. Shepard, 75 N. H. 52, 71 Atl. 26; Jones v. Hurlburt, 39 Barb. (N. Y.) 403; Ratliff v. Huntly, 27 N. C. 545; Waters-Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 508, 60 S. W. 453; Bogle v. Sullivant, 1 Call (Va.), 561; Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277; Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 309, 53 N. W. 501; Cluquot v. United States, 3 Wall. (U.

S.) 114, 18 L. Ed. 116; Roach v. Hulings, 16 Pet. (U. S.) 319, 10 L. Ed. 979; Wyckoff v. Wagner Type-writer Co., 99 Fed. 158.

⁴⁵ Western Union Tel. Co. v. Rowell, 153 Ala. 295, 45 South. 73; Prestwood v. Eldridge, 119 Ala. 72, 24 South. 729; Ong Chair Co. v. Cook, 85 Ark. 390, 108 S. W. 203; Wetherell v. Hollister, 73 Conn. 622, 48 Atl. 826; Doylestown Agricultural Co. v. Ewing (Del.), 79 Atl. 202; Jordan v. Delaware Tel. etc. Co. (Del.), 75 Atl. 1014; McCartney v. People's R. Co. (Del.), 78 Atl. 771; Daniels v. Liebig Mfg. Co., 2 Marv. (Del.) 207, 42 Atl. 447; Territory v. Egan, 3 Dak. 119, 13 N. W. 568; Warner v. Robertson, 13 Ga. 370; Kinser v. Cowie, 235 Ill. 383, 126 Am. St. Rep. 221, 85 N. E. 623; Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079; West Chicago etc. R. Co. v. Vale, 117 Ill. App. 155; Wabash R. Co. v. Barrett, 117 Ill. App. 315; Edmunds

passes upon the competency of evidence and of the witnesses;⁴⁶ the *jury* upon the credibility of those witnesses.⁴⁷

Mfg. Co. v. McFarland, 118 Ill. App. 256; Waukegan v. Weale, 118 Ill. App. 461; Fairbury v. Rogers, 98 Ill. 554; City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893; Harrod v. Latham Mercantile etc. Co., 77 Kan. 466, 95 Pac. 11; Sutherland-Innes Co. v. Weaver, 143 Ky. 827, 137 S. W. 542; Union Light etc. Co. v. Young, 141 Ky. 805, 133 S. W. 991; Young v. Smith, 10 B. Mon. (Ky.) 293; Louisville etc. R. Co. v. Mount, 125 Ky. 593, 101 S. W. 1182, 31 Ky. Law Rep. 210; Adams v. Simpson, 31 Ky. Law Rep. 604, 103 S. W. 247; Moyer v. Justis, 112 Md. 220, 76 Atl. 496; United R. etc. Co. v. Corbin, 109 Md. 442, 72 Atl. 606; Jackson v. Jackson, 82 Md. 17, 34 L. R. A. 773, 33 Atl. 317; Gardiner v. Courtright, 165 Mich. 54, 130 N. W. 322; Brucker v. Manistee etc. R. Co., 166 Mich. 330, 130 N. W. 822; Woodruff v. Schultz, 155 Mich. 11, 16 Ann. Cas. 346, 118 N. W. 579; Rhoades v. Chicago etc. R. Co., 58 Mich. 263, 25 N. W. 182; Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 587; Mobile etc. R. Co. v. Jackson, 92 Miss. 517, 46 South. 142; Printz v. Miller, 233 Mo. 47, 135 S. W. 19; Seehorn v. American Nat. Bank, 148 Mo. 256, 49 S. W. 886; State v. Chick, 146 Mo. 645, 48 S. W. 829; Winn v. M. W. A., 157 Mo. App. 1, 137 S. W. 292; In re Murphy, 43 Mont. 353, 116 Pac. 1004; Metz v. Chicago etc. R. Co., 88 Neb. 459, 129 N. W. 994; Hoover v. De Klotz, 89 Neb. 146, 130 N. W. 1052; Carroll v. Central etc. R. Co. (N. J.), 79 Atl. 293; Territory v. O'Donnell, 4 N. M. 66 (196), 12 Pac. 743; Van Gaasbeek v. Staples, 177 N. Y. 524, 69 N. E. 1132; Fay v. Brooklyn Heights R. Co., 69 App. Div. 563, 75 N. Y.

Supp. 113; Craft v. Norfolk etc. R. Co., 136 N. C. 49, 48 S. E. 519; Southern L. & T. Co. v. Benbow, 135 N. C. 303, 47 S. E. 435; Perin v. Cincinnati etc. R. Co., 9 Ohio Dec. (Reprint) 113, 17 Cine. L. Bul. 261; Multnomah v. Willamette Towing Co., 49 Or. 204, 89 Pac. 389; Kiester v. Miller, 25 Pa. 481; Buckman v. Philadelphia R. Co. (Pa.), 81 Atl. 332; Jones v. Chicago etc. R. Co., 26 S. D. 288, 128 N. W. 323; Russell v. Mason, 8 Tex. 226; Wood v. Samuels, 1 Tex. App. Civ. Cas., § 922; Meyers v. Highland Boy Gold Min. Co., 28 Utah, 96, 77 Pac. 347; Metropolitan Ins. Co. v. De Vault, 109 Va. 392, 17 Ann. Cas. 27, 63 S. E. 982; Jones v. Leslie, 61 Wash. 107, Ann. Cas. 1912B, 1158, 112 Pac. 81; Hall v. Northwest Lumber Co., 61 Wash. 351, 112 Pac. 369; Herbert v. Hillman, 50 Wash. 83, 96 Pac. 837; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165; Zonne v. Wiersom, 3 Pinn. (Wis.) 217, 3 Chand. 240; Goldsmith v. Thuringia Ins. Co., 114 Fed. 914, 52 C. C. A. 534.

⁴⁶ Dominick v. Randolph, 124 Ala. 557, 27 South. 481; Dowdy v. Watson, 115 Ga. 42, 41 S. E. 266; Weston v. Teufel, 213 Ill. 291, 72 N. E. 908; Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256; Indiana Farmers' Live-stock Ins. Co. v. Byrckett, 9 Ind. App. 443, 36 N. E. 779; Seaboard Air Line R. Co. v. Phillips, 108 Md. 285, 70 Atl. 232; Commonwealth v. Reagan, 175 Mass. 335, 78 Am. St. Rep. 496, 56 N. E. 577; Colby v. Portman, 115 Mich. 95, 72 N. W. 1098; Kitz v. Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64; Ross v. Espy, 66 Pa. 481, 5 Am. Rep. 394.

⁴⁷ Venable v. Venable, 165 Ala. 621, 51 South. 833; American Oak Extract Co. v. Ryan, 112 Ala. 337,

The sphere of the jury, as compared with that of the judge, is a limited one.⁴⁸ The judge in a large degree controls

20 South. 644; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *Finerty v. Fritz*, 6 Colo. 137; *Schleifenbaum v. Rundbaken*, 81 Conn. 623, 71 Atl. 899; *Territory v. Egan*, 3 Dak. 119, 13 N. W. 568; *Phillips v. Brittingham* (Del.), 77 Atl. 964; *Newberry v. State*, 26 Fla. 334, 8 South. 445; *Mills v. State*, 104 Ga. 502, 30 S. E. 778; *Louisville R. Co. v. Rogers*, 136 Ga. 674, 71 S. E. 1102; *Carscallen v. Coeur D'Alene etc. Transp. Co.*, 15 Idaho, 444, 16 Ann. Cas. 544, 99 Pac. 622; *Quincy Gas etc. Co. v. Baumann*, 203 Ill. 295, 67 N. E. 807; *Fabian v. Traeger*, 117 Ill. App. 176, 215 Ill. 220, 74 N. E. 131; *Southern R. Co. v. Limback*, 172 Ind. 89, 85 N. E. 354; *Rhodes v. Des Moines etc. R. Co.*, 139 Iowa, 327, 115 N. W. 503; *Shellabarger v. Nafus*, 15 Kan. 547; *Chesapeake etc. R. Co. v. Howard*, 143 Ky. 218, 136 S. W. 153; *Cincinnati etc. R. Co. v. Evans*, 129 Ky. 152, 110 S. W. 844, 33 Ky. Law Rep. 596; *Parsons v. Huff*, 41 Me. 410; *Western Maryland R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618; *Sullivan v. Reed Fdy. Co.*, 207 Mass. 280, 93 N. E. 676; *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873; *Zart v. Singer Sewing Mach. Co.*, 162 Mich. 387, 127 N. W. 272; *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780; *Allen v. Lyles*, 35 Miss. 513; *Rearden v. St. Louis etc. R. Co.*, 215 Mo. 105, 114 S. W. 961; *Munro v. St. Louis etc. R. Co.*, 155 Mo. App. 710, 135 S. W. 1016; *In re Murphy*, 43 Mont. 353, 116 Pac. 1004; *Lehane v. Butte Electric R. Co.*, 37 Mont. 564, 97 Pac. 1038; *Neeley v. Trautwein*, 79 Neb. 751, 113 N. W. 141; *Myers v. Moore*, 85 Neb. 715, 124 N. W. 157; *Beard v. Kirk*, 11 N. H. 397; *Froelich v. New York*, 199 N. Y. 466,

93 N. E. 79; *Kearns v. Waldron*, 76 N. J. L. 370, 69 Atl. 960; *Territory v. O'Donnell*, 4 N. M. 66 (196), 12 Pac. 743; *Nat. Bank v. Mills*, 99 N. Y. 656, 2 N. E. 27; *Keller v. Halsey*, 202 N. Y. 588, 95 N. E. 634; *Hill v. Aetna L. Ins. Co.*, 150 N. C. 1, 63 S. E. 124; *Park v. Exum*, 156 N. C. 228, 72 S. E. 309; *Strickler v. Gitchel*, 14 Okl. 523, 78 Pac. 94; *McIntosh v. McNair*, 53 Or. 87, 99 Pac. 74; *Second Nat. Bank v. Hoffman*, 229 Pa. 429, 78 Atl. 1002; *Enright v. Pittsburg Junction R. Co.*, 204 Pa. 543, 54 Atl. 317; *Rykard v. Davenport*, 61 S. C. 215, 39 S. E. 372; *International etc. R. Co. v. Shubert* (Tex. Civ. App.), 130 S. W. 708; *Harpold v. Moss*, 101 Tex. 540, 109 S. W. 928; *Metropolitan L. Ins. Co. v. De Vault*, 109 Va. 392, 17 Ann. Cas. 27, 63 S. E. 982; *Allard v. Northwestern Contract Co.*, 64 Wash. 14, 116 Pac. 457; *Herbert v. Hillman*, 50 Wash. 83, 96 Pac. 837; *Parkersburg Nat. Bank v. Hannaman*, 63 W. Va. 358, 60 S. E. 242; *Kuehn v. Wilson*, 13 Wis. 104; *Chicago etc. R. Co. v. Pollock*, 16 Wyo. 321, 93 Pac. 847; *Gallena v. Hot Springs R. Co.*, 13 Fed. 116, 4 McCrary, 371; *Erie R. Co. v. Rooney*, 186 Fed. 16; *Carter v. Baker*, 5 Fed. Cas. No. 2472, 1 Saw. 512, 4 Fish. Pat. Cas. 404.

⁴⁸ *Thrasher v. Oberby*, 51 Ga. 91; *Commonwealth v. Coe*, 115 Mass. 481; *Jones v. Tucker*, 41 N. H. 546; *Doe v. Davis*, 10 Q. B. 314. On the functions of the judge and the jury in the trial of a case, see a valuable article in 4 Harv. L. Rev. 147, by Prof. Thayer, and also *Thay. Cas. Ev.* See extended notes on this general subject, to *State v. Whit* (5 Jones (N. C.) 224), 72 Am. Dec. 538-549; and to *Sharp v. State* (51 Ark. 147,

and guides the actions of the jury from the beginning to the end of the trial. The work of the *jury* is confined to the determination of the *ultimate facts* which are the subject of the issue. The preliminary issues of fact that arise during the trial are with few exceptions determined by the judge. In theory the *judge* only determines those questions of fact which are *preliminary* in their nature and incidental to a decision upon the questions of law which are presented to him in passing on the admission of evidence and upon like questions. But in fact, in various ways in the exercise of their right to guide the course of the trial, judges have come to exercise important functions in co-operation with the jury in determining even the ultimate facts in issue. In applying the various presumptions which constantly limit the judgment of juries, in defining the meaning of the terms which juries are called upon to consider, in excluding from their consideration testimony which may be deemed too remote and in many other ways judges impose restraints upon juries which very naturally limit their power.⁴⁹ It is also in the province of the judge to determine whether there is *sufficient evidence* in the case to warrant its submission to the jury. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury.⁵⁰ But a mere

10 S. W. 228), 14 Am. St. Rep. 27, 36-48; and to *Dunn v. People* (29 N. Y. 523), 86 Am. Dec. 327-331.

⁴⁹ *Bartlett v. Smith*, 11 Mees. & W. 483; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508-511. As to discretion of trial judge in admitting evidence of collateral facts relevant to issue, see *Chesterfield Mfg. Co. v. Leota Cotton Mills*, 194 Fed. 358.

⁵⁰ *Allman v. Gann*, 29 Ala. 240; *St. Louis etc. R. Co. v. Coleman*, 97 Ark. 438, 135 S. W. 338; *Still v. San Francisco etc. R. Co.*, 154 Cal. 559, 129 Am. St. Rep. 177, 20 L. R. A., N. S., 322, 98 Pac. 672; *German-*

American Lumber Co. v. Brock, 55 Fla. 577, 46 South. 740; *Gunn v. Gunn*, 74 Ga. 555, 58 Am. Dec. 447; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432; *W. W. Kimball Co. v. Cruikshank*, 123 Ill. App. 580; *Balzer v. Warring* (Ind.), 95 N. E. 257; *Illinois Cent. R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; *Rothrock v. Cedar Rapids*, 128 Iowa, 252, 103 N. W. 475; *Patterson v. Hansel*, 4 Bush (Ky.), 654; *Maryland etc. R. Co. v. Hammond*, 110 Md. 124, 72 Atl. 650; *Moyer v. Justis*, 112 Md. 220, 76 Atl. 496;

scintilla of evidence or mere surmise will not sustain a refusal on the part of the judge to take the case from the jury and to grant a nonsuit.⁵¹ The recent decisions have extended the province of the judge in such cases and have completely exploded the old doctrine by which a judge was compelled to submit the case to the jury if there was a scintilla of evidence to support the claim of the plaintiff. In place of the old rule has come the more reasonable one, that in every case there is a preliminary question for the judge whether there is evidence upon which the jury may properly proceed to find a verdict.⁵² When the evidence with

Coffin v. Phenix Ins. Co., 15 Pick. (Mass.) 291; Wager v. Lamont, 135 Mich. 521, 98 N. W. 1; Baird v. Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; Henry v. Omaha Packing Co., 81 Neb. 237, 115 N. W. 777; Stone v. Danbury, 46 N. H. 139; Wilkins v. Standard Oil Co., 78 N. J. L. 524, 75 Atl. 166; McCarthy v. Metropolitan L. Ins. Co., 75 N. J. L. 887, 69 Atl. 170; Cetofonte v. Camden Coke Co., 78 N. J. L. 662, 75 Atl. 913, 27 L. R. A., N. S., 1058; Toppi v. McDonald, 128 App. Div. 443, 112 N. Y. Supp. 821; Harvell v. Weldon Lumber Co., 154 N. C. 254, 70 S. E. 389; Paulsen v. Modern Woodmen of America, 21 N. D. 235, 130 N. W. 231; Lane v. Choctaw etc. R. Co., 19 Okl. 324, 91 Pac. 883; Jackson v. Sumpter Valley R. Co., 50 Or. 455, 93 Pac. 356; Philadelphia Trust etc. Co. v. Philadelphia etc. R. Co., 160 Pa. 590, 28 Atl. 960; Bain v. Petroleum Iron Works Co., 226 Pa. 414, 75 Atl. 1604; Pickens v. South Carolina etc. R. Co., 54 S. C. 498, 32 S. E. 567; Gulf etc. R. Co. v. Wafer (Tex. Civ. App.), 130 S. W. 712; St. Louis Southwestern R. Co. v. Thompson (Tex. Civ. App. 1907), 108 S. W. 453; Roedler v. Chicago etc. R. Co., 129 Wis. 270, 109 N. W. 88; United States v. Kansas etc. R. Co., 189 Fed.

471; Sioux City etc. R. Co. v. Stout, 17 Wall. (U. S.) 657, 21 L. Ed. 745.

⁵¹ Libby v. Cook, 222 Ill. 206, 78 N. E. 599; Carr v. Silica Co., 153 Ill. App. 511; Dunnington v. Syfers, 157 Ind. 458, 62 N. E. 29; Connor v. Giles, 76 Me. 132; Consolidated Gas etc. Co. v. State, 109 Md. 186, 72 Atl. 651; Hillyer v. Dickinson, 154 Mass. 502, 28 N. E. 905; Strauss v. American Chewing Gum Co., 134 Mo. App. 110, 114 S. W. 73; Baldwin v. Shannon, 43 N. J. L. 596; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743, 20 L. R. A. 48, 33 N. E. 472; Wittkowsky v. Wasson, 71 N. C. 451; Hyatt v. Johnston, 91 Pa. 196; Paschall v. Brown (Tex. Civ. App.), 133 S. W. 509; Ketterman v. Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683; Pleasants v. Fant, 22 Wall. (U. S.) 116, 22 L. Ed. 780; Ryder v. Wombwell, L. R. 4 Ex. 32, 38 L. J. Ex. 8, 19 L. T., N. S., 491, 17 Wkly. Rep. 167.

⁵² Southern Bell Tel. etc. Co. v. Mayo, 134 Ala. 641, 33 South. 16; Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Denver Jobber's Assn. v. Rumsey, 18 Colo. App. 320, 71 Pac. 1001; Adams Express Co. v. Adams, 29 App. Cas. (D. C.) 250; Frazer v. Howe, 106 Ill. 563; Orne v. Cook, 31 Ill. 238; Wright v. Chicago etc. R. Co.

all the inferences that the jury can justifiably draw from it is insufficient to support a verdict for the plaintiff, it is the duty of the court to take the case from the jury and to *direct a verdict* or grant a *nonsuit* as the facts of the case may warrant.⁵³ It is proper for the court to so instruct the jury when the evidence has been too loose and inconclusive to establish the facts sought to be proved

(Ind. App.), 95 N. E. 129; Ohio etc. R. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Gillespie v. Ashford, 125 Iowa, 729, 101 N. W. 649; Connor v. Giles, 76 Me. 132; Nailor v. Bowie, 3 Md. 251; Denny v. Williams, 5 Allen (Mass.), 1; Cronin v. Philadelphia Fire Assn., 119 Mich. 74, 77 N. W. 648; Mynning v. Detroit etc. Ry. Co., 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; Carroll v. Interstate Rapid Transit Co., 107 Mo. 653, 17 S. W. 889; Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297; Olmstead v. Red Cloud, 86 Neb. 528, 125 N. W. 1101; Anderson v. Chicago etc. R. Co., 84 Neb. 311, 133 Am. St. Rep. 626, 120 N. W. 1114; Sommers v. Myers, 69 N. J. L. 24, 54 Atl. 812; Linkauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743, 20 L. R. A. 48, 33 N. E. 472; Aldrich v. Laul, 126 App. Div. 427, 110 N. Y. Supp. 897; Dwight v. Germania Ins. Co., 103 N. Y. 341, 359, 57 Am. Rep. 729, 8 N. E. 654; Baulee v. New York & H. Ry. Co., 59 N. Y. 356, 17 Am. Rep. 325; Milbank v. Dennistoun, 21 N. Y. 386, 19 How. Fr. 126; Ware v. Raven, 6 N. Y. St. 259; Wittkowsky v. Wasson, 71 N. C. 451; Matthis v. Matthis, 48 N. C. 132; Ruffner v. Cincinnati etc. R. Co., 5 Ohio Dec. (Reprint) 569, 6 Am. L. Rec. 685; Sidney Co. v. School District, 122 Pa. 494, 9 Am. St. Rep. 124, 15 Atl. 881; Hyatt v. Johnston, 91 Pa. 196; Carter v. Oliver Co., 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 419; Wool-

wine's Admr. v. Chesapeake etc. Ry. Co., 36 W. Va. 329, 32 Am. St. Rep. 859, 16 L. R. A. 271, 15 S. E. 81; Lea v. Hernandez, 10 Tex. 137; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Fitts v. Cream City Ry. Co., 59 Wis. 323, 18 N. W. 186; Langhoff v. Milwaukee Ry. Co., 19 Wis. 489; Dryden v. Britton, 19 Wis. 22; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840; Bagley v. Cleveland Rolling Mills, 21 Fed. 159; Central Nat. Bank v. Royal Ins. Co., 103 U. S. 783, 26 L. Ed. 459; Toomey v. Railway Co., 3 Com. B., N. S., 146, 91 Eng. Com. L. 146; Sioux City Ry. Co. v. Stout, 17 Wall. (U. S.) 657-663, 21 L. Ed. 745; Improvement Co. v. Munson, 14 Wall. (U. S.) 442, 20 L. Ed. 867; Commissioners v. Clark, 94 U. S. 278-284, 24 L. Ed. 59.

⁵³ Hunt v. Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; Beard v. Railway Co., 79 Iowa, 518, 18 Am. St. Rep. 381, 7 L. R. A. 280, 44 N. W. 800; Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; Deyo v. New York etc. R. Co., 34 N. Y. 9, 88 Am. Dec. 418; Achtenhagen v. Watertown, 18 Wis. 331, 86 Am. Dec. 769; Metropolitan Ry. Co. v. Moore, 121 U. S. 558, 30 L. Ed. 1022, 7 Sup. Ct. Rep. 1334; Ellis v. Ohio Life Ins. Co., 4 Ohio St. 628, 64 Am. Dec. 610, where it was contended by counsel that a nonsuit infringed on the constitutional right of trial by jury.

without indulging in mere conjecture or speculation.⁵⁴ But the judge should not in so doing encroach upon the province of the jury by dictating or influencing their verdict when there is any sufficient evidence which tends to show that there are two sides to the controversy. In the United States supreme court Justice Swayne has said: "Though the duties of the court and jury are correlative, they are distinct; and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system."⁵⁵ The court may instruct hypothetically upon facts which there is evidence tending to prove, but it is erroneous to submit to the determination of the jury a fact or a state of facts which there is no evidence in the case tending to prove.⁵⁶ It is erroneous for the judge to instruct that the plaintiff cannot recover upon a supposed

⁵⁴ *Spring Gardens Ins. Co. v. Evans*, 9 Md. 1, 66 Am. Dec. 308; *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Satterwhite v. Hicks*, Busb. (N. C.) 105, 57 Am. Dec. 577; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

⁵⁵ *Hickman v. Jones*, 9 Wall. 197, 202, 19 L. Ed. 551; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Wilson v. Huston*, 13 Mo. 146, 53 Am. Dec. 138; *Trovillo v. Tilford*, 6 Watts (Pa.), 468, 31 Am. Dec. 484; *Claffin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Garner v.*

State, 28 Fla. 115, 29 Am. St. Rep. 232, 9 South. 835.

⁵⁶ *Johnson v. Jennings*, 10 Gratt. (Va.) 1, 60 Am. Dec. 323; *Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92; *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *State v. Hildreth*, 9 Ired. (N. C.) 440, 51 Am. Dec. 369; *Swank v. Nichols*, 24 Ind. 199; *Cothran v. State*, 39 Miss. 541; *Dickerson v. Johnson*, 24 Ark. 251; *Webster College v. Tyler*, 35 Mo. 268; *Bond v. Hall*, 8 Jones (N. C.), 14; *Herdie v. Bilger*, 47 Pa. 60; *Andrews v. Smithwick*, 20 Tex. 111; *Manwell v. Briggs*, 17 Vt. 176; *Chicago etc. R. R. Co. v. Dickson*, 88 Ill. 431; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

state of facts not shown by the evidence, thus leading the jury to believe that he was under obligations not shown by the evidence.⁵⁷ The court should not lay down abstract propositions of law, however correct, which are not relevant or pertinent to the evidence or facts in issue.⁵⁸ This rule is merely another way of stating the proposition that instructions should be confined to the issues and based upon the evidence. The refusal to give such instructions as are not so limited can never constitute error.⁵⁹ In England it is the authorized practice for the judge in summing up to intimate his opinion as to the weight of the evidence and what is proved thereby. It is no ground of error that the judge expressed in strong terms his opinion as to the facts proved, if he left the jury to the exercise of their discretion in determining those facts;⁶⁰ and even a mistaken observation of the judge as to the facts proved was no ground of error, where the question of fact was

⁵⁷ *Harrison v. Cachelin*, 27 Mo. 26; *Frantz v. Rose*, 89 Ill. 590; *Swank v. Nichols*, 24 Ind. 199; *Bogle v. Kreitzer*, 46 Pa. 465.

⁵⁸ *Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; *Coughlin v. People*, 18 Ill. 266, 68 Am. Dec. 541; *Thorwegan v. King*, 111 U. S. 549, 28 L. Ed. 514, 4 Sup. Ct. Rep. 529; *Stier v. Oskaloosa*, 41 Iowa, 353; *McNair v. Platt*, 46 Ill. 211.

⁵⁹ *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62; *Snider v. Adams Ex. Co.*, 63 Mo. 376; *Hamilton v. Russell*, 1 Cranch (U. S.), 309, 1 L. Ed. 118; *Chirac v. Reinecker*, 2 Pet. (U. S.) 613, 7 L. Ed. 538; *Roach v. Hulings*, 16 Pet. (U. S.) 319, 10 L. Ed. 979; *Harper v. Smith*, Fed. Cas. No. 6092, 1 Cranch C. C. 495; *Goodman v. Simonds*, 20 How. (U. S.) 359, 15 L. Ed. 937; *Michigan Bank v. Eldred*, 9 Wall. (U. S.) 544, 19 L. Ed. 763;

Long v. State, 12 Ga. 294; *United States v. Breitling*, 20 How. (U. S.) 252, 15 L. Ed. 901; *Storey v. Brennan*, 15 N. Y. 524, 69 Am. Dec. 629; *Rouse v. Lewis*, 4 Abb. App. Dec. (N. Y.) 121; *Conlin v. San Francisco etc. R. R. Co.*, 36 Cal. 404; *Dwyer v. Dunbar*, 5 Wall. (U. S.) 318, 18 L. Ed. 489; *Etting v. Bank of United States*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419; *Laber v. Cooper*, 7 Wall. (U. S.) 565, 19 L. Ed. 15; *Rushmore v. Hall*, 12 Abb. Pr. (N. Y.) 420; *Kiernan v. Rocheleau*, 6 Bosw. (N. Y.) 148; *New York v. Price*, 5 Sand. (N. Y.) 542; *Clark v. Vorce*, 19 Wend. (N. Y.) 232; *Leven v. Smith*, 1 Denio (N. Y.), 571; *Drake v. Curtis*, 1 Cush. (Mass.) 395.

⁶⁰ *Foster v. Steele*, 5 Scott, 28; *Solarte v. Melville*, 7 Barn. & C. 430, 108 Eng. Reprint, 784; *Belcher v. Prittie*, 4 Moo. & S. 295; *S. C.*, 10 Bing. 408.

left to the jury.⁶¹ Likewise in federal courts the judge may sum up the facts to the jury and submit the case to them with the proper instructions as to the rules of law applicable to the facts, being careful to separate the law from the facts, and leave the facts to the jury for their sole determination.⁶² The court is not obliged in any case to give its opinion upon the weight of the evidence.⁶³ So in some states comments upon evidence are permissible, but in the greater number of jurisdictions the court must not express an opinion upon the weight of evidence, but may state the evidence and declare the law applicable thereto. Such provisions prevail in Arkansas, California, Georgia, Maine, Massachusetts, Nevada, North Carolina, Tennessee, Texas, and other states. The statutes and constitutional provisions in such states make it certain that the judge may not express an opinion as to what is proved or what is not proved in the case of conflicting evidence, and in these jurisdictions such an expression of opinion is error.⁶⁴ It is the duty of the judge to declare to the jury what the law is, and then state hypo-

⁶¹ Davidson v. Stanley, 3 Scott N. E. 49; S. C., 2 Man. & G. 721.

⁶² McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170-182, 7 L. Ed. 98.

⁶³ Smith v. Carrington, 4 Cranch (U. S.), 62, 2 L. Ed. 550; United States v. Burnham, Fed. Cas. No. 14,690, 1 Mason, 57.

⁶⁴ State v. Dixon, 75 N. C. 275; Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351; Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Melvin v. Easley, 1 Jones (N. C.), 386, 62 Am. Dec. 171; Conner v. State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217; Stephens v. State, 10 Tex. App. 124. An expression of opinion by the judge that there is no evidence tending to prove a contested fact, made to one of the jury who returned after the retirement of the jury to inquire con-

cerning that point, is error: Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436. It is erroneous for the judge to state that the testimony of a certain witness was not material: Jessup v. Gragg, 12 Ga. 261; or to assume that a material fact, which there was evidence tending to prove, had not been proved: Roberts v. Mansfield, 32 Ga. 228; Buttram v. Jackson, 32 Ga. 409; Whitley v. State, 38 Ga. 50. Where the court assumes that an important allegation in the indictment has been proved, this is a charge on the weight of the evidence, and objectionable: Searcy v. State, 1 Tex. App. 443. A court can never legitimately instruct that any evidence before the jury is sufficient to convict of the crime charged: Lunsford v. State, 9 Tex. App. 217. See Renfro v. State, 9 Tex. App. 229.

thetically that if certain facts are proved they are to find for the plaintiff, otherwise not.⁶⁵ The judge, in charging the jury, may call their attention to evidence of particular facts, if controverted, for the purpose of directing them to the rules of law that must govern them in arriving at the truth, and if uncontroverted, for the application of the law to the facts. All that is required of the judge is that he should neither decide nor endeavor to influence the jury in their decision on the facts.⁶⁶ Where the rule prevails that the judge may not charge upon the weight of the evidence, it is consistently held that he may not comment or make observations upon the evidence which conveys to the mind of the jury his opinion as to what inference of fact should be drawn from other facts in evidence.⁶⁷ Instructions as to general rules for weighing evidence may be given, but not as to the weight of particular evidence. The court may instruct as to which party has the burden of proof, without charging "on the effect of evidence."⁶⁸ The credibility of particular witnesses is a matter strictly within the province of the jury, and the court invades this province and commits error if it instructs or expresses an opinion as to the credibility of the testimony of a witness or the weight to be attached to it.⁶⁹ It is erroneous for the judge, in giving his instructions, to direct the attention of the jury to certain portions only of the testimony, for by this means the jury may easily be misled by losing sight of other important parts of the

⁶⁵ Keener v. State, 18 Ga. 194, 63 Am. Dec. 269.

⁶⁶ Jones v. State, 13 Tex. 168, 62 Am. Dec. 560.

⁶⁷ Anderson v. Kincheloe, 30 Mo. 520; Jones v. Jones, 57 Mo. 138; Richards v. Fuller, 38 Mich. 653; Mitchell v. Mayor, 49 Ga. 19, 15 Am. Rep. 669; Smith v. State, 43 Tex. 103; Bond v. Warren, 8 Jones (N. C.), 191; Easterling v. State, 30 Ala. 46; Burt v. Gwinn, 4 Har. & J. (Md.) 507; Case v. Weber, 2 Ind. 108.

⁶⁸ Hill v. Nichols, 50 Ala. 336.

⁶⁹ Crutchfield v. Richmond etc. R. Co., 76 N. C. 320; McMinn v. Whelan, 27 Cal. 300, 319; Rice v. State, 3 Tex. App. 451; Commonwealth v. Barry, 9 Allen (Mass.), 276; Gilliam v. Ball, 49 Mo. 249; Shenuit v. Brenggestrad, 8 Mo. App. 46; Chesapeake etc. Canal Co. v. Knapp, 9 Pet. (U. S.) 541, 9 L. Ed. 222; Melvin v. Easley, 1 Jones (N. C.), 386, 62 Am. Dec. 171.

evidence. And instructions which have a tendency to exclude from the minds of the jury important and material portions of the evidence, and to confine their attention to isolated portions of it, are erroneous. Indeed, this is merely one way in which the court might express bias or opinion as to the weight of evidence.⁷⁰ The judge, however, may exercise a reasonable discretion in *reviewing the evidence* to aid the jury in arriving at a just conclusion. It does not necessarily follow that it is error for the judge to so charge the jury that they are able to infer the view entertained by him as to the facts in issue. If the language of the court is merely advisory and not intended to fetter the exercise of the judgment of the jury, he may *recapitulate* the evidence calling their attention to undisputed facts, refreshing their memory as to important matters and thus directing their attention to the real points in issue.⁷¹ The control of the judge over the part in the trial taken by the jury does not end when the verdict is rendered; for it is the duty of the court to *set the verdict aside* if unwarranted by the evidence and to grant a new trial. The foregoing does not purport to give more than a very brief outline of the respective functions of judge and jury, but sufficient, it is considered, to convey what responsibilities rest upon each department. The subject is partially outside the scope of this work, and lies more in the domain of the trial and its conduct, and is dealt with only where it overlaps the treatment of the law of evidence properly so called.

⁷⁰ *Sawyer v. Hannibal etc. R. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382; *Parker v. Donaldson*, 6 Watts & S. (Pa.) 132; *Hutchinson v. Crain*, 3 Ill. App. 20; *McAdory v. State*, 62 Ala. 154; *Chesney v. Meadows*, 90 Ill. 430.

⁷¹ *Nudd v. Burrows*, 91 U. S. 426, 439, 23 L. Ed. 286; *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. Rep. 393, 9 L. R. A. 807, 46 N. W. 1045; *Cobb v. Covenant Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619, 10 L. R.

A. 666, 26 N. E. 230; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 26 Am. St. Rep. 482, 28 N. E. 651; *McClain v. Commonwealth*, 110 Pa. 263, 1 Atl. 45. A jury is not justified in assuming the converse of a fact simply because they discredit the fact as proved: See note on "Disbelief by Court and Jury of Certain Testimony as Affirmative Evidence to Contrary," *Hyslop v. Boston & Maine R. R.*, 21 Ann. Cas. 1123.

§ 174a (171). **Same—Illustrations of questions of law.** The following will be found to be useful illustrations of *questions of law for the court*: The term when a judgment was entered;⁷² what are the general customs of a country;⁷³ what is a waiver;^{73a} what acts constitute an abandonment of a contract;⁷⁴ the nature or form of an action;⁷⁵ the reasonableness of rules prescribed by railroad companies and like corporations;⁷⁶ the duty of determining what parol evidence is inconsistent with the record;⁷⁷ what constitutes ownership;⁷⁸ and what the discontinuance of an action;⁷⁹ the proper authentication of a foreign judgment.⁸⁰ Where a witness called by a party has given testimony damaging to the party producing him, and it appears that the party by whom he has been produced has been misled and taken by surprise, and had some reason from his previous statement to believe that the witness would give testimony favorable to his side, there is no reason upon principle why such party should not be allowed to contradict his own witness, who has betrayed him, and by his unexpected testimony placed the party producing and standing sponsor for him in a false light before the court or jury. The preliminary question of surprise and of the method of proof thereof is in the sound discretion of the trial court.⁸¹ It is for the court to state as a matter of law what are the duties of a common carrier, and then for the jury to apply the facts as proved, and say whether there was negligence or not.⁸²

⁷² Adams v. Betz, 1 Watts (Pa.), 425, 26 Am. Dec. 79.

⁷³ Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

^{73a} Spring Gardens Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308.

⁷⁴ Dula v. Cowles, 7 Jones (N. C.), 290, 75 Am. Dec. 463.

⁷⁵ Beebe v. Stutsman, 5 Iowa, 271; Estes v. Boothe, 20 Ark. 583.

⁷⁶ South Florida Ry. Co. v. Rhodes, 25 Fla. 40, 23 Am. St. Rep. 506, 3 L. R. A. 733, 5 South. 633.

⁷⁷ Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159.

⁷⁸ Baker v. Summers, 201 Ill. 52, 66 N. E. 302.

⁷⁹ Tyler v. Mutual etc. Co., 17 App. Cas. (D. C.) 85.

⁸⁰ Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556.

⁸¹ Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 93 Pac. 1049.

⁸² Madden v. Port Royal etc. R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65. For other illustrative cases see 38 Cyc. Trial, 1526, 1527.

§ 174b (171). **Same—Illustrations of questions of fact.** The following will serve as illustrations of questions of fact for the consideration of the jury: What are appurtenances;⁸³ whether a party had notice of an assignment;⁸⁴ existence of boundary;⁸⁵ existence of custom or usage that is not general, that is confined to one locality;⁸⁶ delivery;⁸⁷ rescission of contract;⁸⁸ whether a contract was made for illegal purposes;⁸⁹ whether a deed has been delivered.⁹⁰ What acts or what declarations amount to a waiver are questions of law; whether such acts or declarations were made or performed, is for the jury.⁹¹ The genuineness of signatures to documents and of the documents themselves,⁹² and the question of knowledge by a party to a contract of the mental condition of the other party thereto are for the jury.⁹³ Other illustrative cases are appended.⁹⁴

⁸³ Hall v. Benner, 1 Penr. & W. (Pa.) 402, 21 Am. Dec. 394.

⁸⁴ Marr v. Hanna, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449.

⁸⁵ Newman v. Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98.

⁸⁶ Farnsworth v. Chase, 19 N. H. 534, 51 Am. Dec. 206; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

⁸⁷ Atwell v. Miller, 6 Md. 10, 61 Am. Dec. 294.

⁸⁸ Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363.

⁸⁹ Bellows v. Russell, 20 N. H. 427, 51 Am. Dec. 238.

⁹⁰ Hannah v. Swarner, 8 Watts (Pa.), 9, 34 Am. Dec. 442.

⁹¹ Bogart v. Nevins, 6 Serg. & R. 361; Bank of Utica v. Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; Rhett v. Poe, 2 How. (U. S.) 481, 11 L. Ed. 338.

⁹² Ayrhart v. Wilhelmy, 135 Iowa, 290, 112 N. W. 782; Magee v. Osborn, 32 N. Y. 669; Holbrook v. Nichol, 36 Ill. 161.

⁹³ Judd v. Gray, 156 Ind. 278, 59 N. E. 849.

⁹⁴ Atwood v. Jarret, 81 Conn. 532, 71 Atl. 569; Hoffecker v. New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101; Smallwood v. Jones, 128 Ga. 41, 57 S. E. 99; Fleming v. Shepherd, 83 Ga. 338, 9 S. E. 789; Johnson v. Dooly, 80 Ga. 307, 7 S. E. 225; Branch v. Palmer, 65 Ga. 210; Brakebill v. Leonard, 40 Ga. 60; Latham v. Roach, 72 Ill. 179; Judd v. Gray, 156 Ind. 278, 59 N. E. 849; Wilson v. Irish, 62 Iowa, 260, 17 N. W. 511; Louisville etc. R. Co. v. Munford, 24 Ky. Law Rep. 416, 68 S. W. 635; Humphries v. Parker, 52 Me. 502; Baltimore Refrigerating etc. Co. v. Kreiner, 109 Md. 361, 71 Atl. 1066; Harlan v. Brown, 2 Gill (Md.), 475, 41 Am. Dec. 436; McCarthy v. Peach, 186 Mass. 67, 1 Ann. Cas. 801, 70 N. E. 1029; Valentine v. Minneapolis etc. R. Co., 155 Mich. 151, 118 N. W. 970; Toulman v. Swain, 47 Mich. 82, 10 N. W. 117; Hoyt v. Duluth etc. R. Co., 103 Minn. 396, 115 N. W. 263;

§ 175 (172). **Same—Mixed questions of law and fact.**—We have already had occasion to refer to the difficulties of the questions of mixed law and fact which occasionally arise. The blending of such questions often makes it difficult to apply the rule that questions of fact are to be determined by the jury and questions of law by the judge. Many actions, such as those for malicious prosecution, for fraud and for negligence,⁹⁵ arise from causes involving both questions of law and of fact.⁹⁶ In such cases it is the general rule that the question is to be left to the jury to decide after they have been properly instructed by the judge as to the law applicable to the case.⁹⁷ In the absence of any special statutory provisions the court says what constitutes libel, and if it can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, then it can rule, as a matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for the defendant.⁹⁸ It is for the court to deter-

Kent v. Miltenberger, 15 Mo. App. 480; *Hupburn v. Gaston*, 3 N. J. L. 623; *Hess v. Kaufherr*, 128 App. Div. 526, 112 N. Y. Supp. 832; *Brown v. Vandeuzeur*, 10 Johns. (N. Y.) 51; *Fry v. Bennett*, 3 Bosw. (N. Y.) 200; *Jordan v. Farthing*, 117 N. C. 181, 23 S. E. 244; *Glover v. Flowers*, 101 N. C. 134, 7 S. E. 579; *Spence v. Baxter*, 95 N. C. 170; *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. Ct. 229; *Missouri etc. R. Co. v. Connelly*, 14 Tex. Civ. App. 529, 39 S. W. 145; *Palmer v. Oregon Short Line R. Co.*, 34 Utah, 466, 16 Ann. Cas. 229, 98 Pac. 689; *Porter v. Platt*, 57 Vt. 533; *Keen v. Monroe*, 75 Va. 424; *Westurn v. Page*, 94 Wis. 251, 68 N. W. 1003; *Hooe v. United States*, 41 Ct. of Cl. 378.

⁹⁵ *Fraud: Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301; *negligence: Wabash Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E.

391; *malicious prosecution: Gulf Ry. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744.

⁹⁶ The province of the judge and jury relative to questions of mixed law and fact is stated in the following cases: *Minor v. Edwards*, 12 Mo. 137, 49 Am. Dec. 121; *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 306; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736.

⁹⁷ *Hutchinson v. Bowker*, 5 Mees. & W. 535; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Gulf Ry. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744.

⁹⁸ *Dauphiny v. Buhne*, 153 Cal. 757, 126 Am. St. Rep. 136, 96 Pac. 880; *Tonini v. Cerasco*, 114 Cal. 266, 46 Pac. 103; *Downing v. Brown*, 3 Colo. 571; *Donaghue v. Gaffy*, 54 Conn. 257, 7 Atl. 552; *Delaware State F. & M. Ins. Co. v. Croasdale*, 6

mine whether or not the language will bear a double meaning, one of which is libelous, and when it has determined that it will bear such meaning, it is for the jury to determine in which sense it was used.⁹⁹ If the court, after con-

Houst. (Del.) 181; Ball v. Evening etc. Pub. Co., 237 Ill. 592, 86 N. E. 1097; Dowie v. Priddle, 216 Ill. 553, 3 Ann. Cas. 526, 75 N. E. 243; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; State v. Cooper, 138 Iowa, 516, 116 N. W. 691; Estham v. Curd, 15 B. Mon. (Ky.) 102; Kilgour v. Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716; Twombly v. Monroe, 136 Mass. 464; Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527, 46 L. R. A. 397, 80 N. W. 575; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595; Diener v. Star Chronicle Pub. Co., 230 Mo. 613, 132 S. W. 1143; Reynolds v. Publishers, 155 Mo. App. 612, 135 S. W. 103; Thorman v. Bryngelson, 87 Neb. 53, 127 N. W. 117; Rossiter v. New York Press Co., 141 App. Div. 339, 126 N. Y. Supp. 325; Hunt v. Bennett, 19 N. Y. 173; Mank v. Brundage, 68 Ohio St. 89, 62 L. R. A. 477, 67 N. E. 152; Cleveland etc. Printing Co. v. Nethersole, 84 Ohio St. 118, Ann. Cas. 1912B, 978, 95 N. E. 735; Pittsburgh etc. R. Co. v. McCurdy, 114 Pa. 554, 60 Am. Rep. 363, 8 Atl. 230; Good v. Publishing Co., 36 Pa. Sup. Ct. 238; Williams v. McKee, 98 Tenn. 139, 38 S. W. 730; Mitchell v. Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134; Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Urban v. Helmick, 15 Wash. 155, 45 Pac. 747; Morning Journal Assn. v. Duke, 128 Fed. 657, 63 C. C. A. 459; Commercial Pub. Co. v. Smith, 149 Fed. 704, 79 C. C. A. 410; Macdonald v. Printing Co., 32 Ont. 163.

⁹⁹ Penry v. Dozier, 161 Ala. 292, 49 South. 909; Van Vactor v. Walkup, 46 Cal. 124; Tonini v. Cev-

asco, 114 Cal. 266, 46 Pac. 103; Downing v. Brown, 3 Colo. 571; Whitley v. Newman, 9 Ga. App. 89, 70 S. E. 686; Holmes v. Clisby, 121 Ga. 241, 104 Am. St. Rep. 103, 48 S. E. 934; Ball v. Evening etc. Pub. Co., 237 Ill. 592, 86 N. E. 1097; Merrill v. Marshall, 113 Ill. App. 447; Gabe v. McGinnis, 68 Ind. 538; Richardson v. Reps, 136 Iowa, 670, 112 N. W. 788; Jensen v. Damm, 127 Iowa, 555, 103 N. W. 798; Henicke v. Griffith, 29 Kan. 516; Beams v. Beams, 138 Ky. 818, 129 S. W. 298; Welsh v. Eakle, 7 J. J. Marsh. (Ky.) 424; Usher v. Severance, 20 Me. 9, 37 Am. Dec. 33; Bar. Assn. v. Hale, 197 Mass. 423, 83 N. E. 885; Twombly v. Monroe, 136 Mass. 464; Hinchman v. Knight, 132 Mich. 532, 94 N. W. 1; Tawney v. Simonsen etc. Co., 109 Minn. 341, 27 L. R. A., N. S., 1035, 124 N. W. 229; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389; Morris v. Sailer, 154 Mo. App. 305, 134 S. W. 98; Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60; Thorman v. Bryngelson, 87 Neb. 53, 127 N. W. 117; Thompson v. Powning, 15 Nev. 195; Plaacke v. Stratford, 72 N. J. L. 487, 5 Ann. Cas. 854, 64 Atl. 146; Hand v. Winton, 38 N. J. L. 122; Church v. Tribune Assn., 63 Misc. Rep. 578, 118 N. Y. Supp. 626; Bergmann v. Jones, 94 N. Y. 51; Lucas v. Nichols, 52 N. C. 32; Launder v. Jones, 13 N. D. 525, 101 N. W. 907; Phillips v. Le June, 25 Ohio C. C. 107; Pittsburgh etc. Pass. R. Co. v. McCurdy, 114 Pa. 554, 60 Am. Rep. 363, 8 Atl. 230; Good v. Pub.

struing the libel, says that the words *can* mean what the innuendo says they *do* mean, it is the province of the jury to say whether they *do* mean what the court has said they *can* mean.¹⁰⁰ The most perplexing of these mixed questions of law and fact are those arising in the decision of cases involving questions of what is *reasonable care or reasonable time*. The authorities, in order to promote uniformity and certainty in the law, are inclined to leave the determination of such questions to the court, if the particular case can be decided according to settled legal principles without passing judgment on the facts. But many of the cases involve such complicated questions of fact as to make it impossible to separate them from the questions of law, and in those cases the whole matter has to be left to the jury for decision.¹ Where, however, from the simple, clear, and undisputed state of the facts, or from

Co., 36 Pa. Sup. Ct. 238; Cregier v. Bunton, 2 Rich. (S. C.) 395; Hancock v. Stephens, 11 Humph. (Tenn.) 507; Crane v. Darling, 71 Vt. 295, 44 Atl. 359; Hanchett v. Chiatovich, 101 Fed. 742, 41 C. C. A. 648; Commercial Pub. Co. v. Smith, 149 Fed. 704, 79 C. C. A. 410; Macdonald v. Printing Co., 32 Ont. 163; Simmons v. Mitchell, 6 App. Cas. 156, 45 J. P. 237, 50 L. R. J. P. C. 11, 43 L. T., N. S., 710, 29 Wkly. Rep. 401.

¹⁰⁰ Whitley v. Newman, 9 Ga. App. 89, 70 S. E. 686; Provisional Government v. Smith, 9 Haw. 257; Mothersill v. Voliva, 158 Ill. App. 16; Hamilton v. Lowery, 33 Ind. App. 184, 71 N. E. 54; Thorman v. Bryngelson, 87 Neb. 53, 127 N. W. 117; Flaacke v. Stratford, 72 N. J. L. 487, 5 Ann. Cas. 854, 64 Atl. 146; Lineham v. Nelson, 197 N. Y. 482, 18 Ann. Cas. 831, 90 N. E. 1114; Getchell v. Merchant Tailors' Exch., 11 Ohio Dec. (Reprint) 390; English v. English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133; Pittock v. O'Niell, 63 Pa. 253, 3 Am. Rep. 544;

McCorkle v. Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420; Parsley v. Wilhelm, 17 Pa. Super. Ct. 444; Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432; Leitz v. Hohman, 16 Pa. Super. Ct. 276; Blagg v. Sturt, 10 Q. B. 899, 11 Jur. 1011, 16 L. Q. B. 39, 116 Eng. Reprint, 340; Mann v. Dempster, 181 Fed. 76, 104 C. C. A. 110.

¹ Aymar v. Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538, and full note thereto; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94; Luckhart v. Ogden, 30 Cal. 547; Howe v. Huntington, 15 Me. 350; Tindal v. Brown, 1 Term Rep. 167, 99 Eng. Reprint, 1033; Spoor v. Spooner, 12 Met. (Mass.) 281; Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Lamb v. Camden Ry. Co., 2 Daly (N. Y.), 454; Cochran v. Toher, 14 Minn. 385; Magee v. Carmack, 13 Ill. 289; Nudd v. Wells, 11 Wis. 407.

the similarity of the case to others which have been decided, the court can determine the question as it does other legal questions, by the application of settled principles and general and uniform rules, it ought to do so. The term "reasonable time" is a technical and legal expression, which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is a matter of law. But whenever the special facts and circumstances are such that the court cannot, by the aid of any legal rule or principle, decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts.² Where, on the other hand, the law "does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, or *res gestae*, it is for the jury to draw the general inference of reasonable or unreasonable in point of fact. In such cases, the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact, and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact."³

² Currey, C. J., in *Luckhart v. Ogden*, 30 Cal. 547.

³ *Starkie on Ev.* 774. *Shepley, J.*, in *Howe v. Huntington*, 15 Me. 354, does not adopt *Starkie's* reasoning entirely. He says that where there is no certain time limited, within which or from which the act is to be done, but it is to be accommodated in some degree to the interests of the party and the course of trade, as in the case of bills at sight or notes on demand, or where it may in some measure depend upon the state of the

weather, as in the case of removal of goods distrained, or the tithe crop, it has been left to the jury to decide upon each case as it arises. Where there is a certain epoch after which the act is to be performed, as soon as it may be conveniently, without regard to one's interest, or to the course of trade, or to other matters not within the control of human agency, the court may be able to come to a satisfactory conclusion for itself, without the assistance of a jury.

The question of *reasonable diligence* in relation to a given subject is often one of difficulty, until, from the frequent recurrence of similar facts in the trial of causes, a settled rule of law is established, as in questions of notice upon bills of exchange and promissory notes. Lord Mansfield held that what is reasonable notice is partly a question of fact and partly a question of law. "It may depend," he said, "in some measure on facts, such as the distance at which the parties live from each other, the course of the post, etc. But whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by everyone, for the sake of certainty."⁴ So, also, as to contracts where something is to be performed, and the contract is silent on the subject, what is a reasonable time for its performance is held to be matter of law.⁵ And so, where the facts are agreed, reasonable time is matter of law.⁶ But where the facts are controverted, and the motives of the parties are involved in the question, then reasonable time is a question for the jury.⁷

⁴ *Tindal v. Brown*, 1 Term Rep. 168, 99 Eng. Reprint, 1033.

⁵ *Attwood v. Clark*, 2 Greenl. (Me.) 249.

⁶ *Hubbard, J.*, in *Spoer v. Spooner*, 12 Met. (Mass.) 284.

⁷ *Hill v. Hobart*, 16 Me. 164; *Ellis v. Thompson*, 3 Mees. & W. 445. Other cases, in which the question of reasonable time has been held one of law for the court, are the following: Where notice of abandonment for a total loss was given by the assured five days after he had received information of it, and the delay was held unreasonable: *Hunt v. Royal Ex. Assur. Co.*, 5 Maule & S. 47, 105 Eng. Reprint, 968. Where the question was as to the time allowed to a tenant at will to remove his family and goods: *Ellis v. Paige*, 1 Pick. (Mass.) 43. As to the time allowed

to a patentee to file a disclaimer of an improvement included in his patent of which he does not claim to be the author: *O'Reilly v. Moore*, 15 How. (U. S.) 121, 14 L. Ed. 610; *Seymour v. McCormick*, 19 U. S. 106, 15 L. Ed. 557. So where the question was as to whether or not one entitled to claim letters of administration had lost his precedence by delay: *Hughs v. Pipkin*, Phil. (N. C.) 4. So where the question was as to the time allowed to one to act on a parol license the facts being agreed: *Gilmore v. Wilbur*, 12 Pick. 124, 22 Am. Dec. 410. In the following cases, on the other hand, owing to controversy about facts, motions, etc., the question of reasonable time was left to the jury. Where the question was as to the time that tithe corn should be left on the premises

§ 175a (172). **Same—Construction of writings—Statutes, etc.**—It is firmly established and universally recognized that the judge is to construe and *interpret the contracts* and other *written instruments* of every description that are offered in evidence. Their construction and interpretation are governed by the established rules of law of which knowledge on the part of the jury cannot be presumed. And hence the question must be left to the court.^s

for comparison with the whole corn: Tracey v. Hendon, 3 Barn. & C. 213. So where the question was as to the time allowed to sell goods after a distress: Pitt v. Shew, 4 Barn. & Ald. 208. So where it was claimed in defense of an action brought for carrying away the plaintiff against his will on the defendant's vessel, that the plaintiff had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail: Spoor v. Spooner, 12 Met. (Mass.) 285. For further illustrations of this subject, see Wells on Questions of Law and Fact, § 151. And the excellent note to Aymar v. Beers (7 Cow. (N. Y.) 705), 17 Am. Dec. 538, to which we are indebted for many excerpts and useful references.

^s Moore v. Leseur, 18 Ala. 606; Estes v. Boothe, 20 Ark. 583; Grant v. Dreyfus (Cal. 1898), 52 Pac. 1074; Luckhart v. Ogden, 30 Cal. 547; Rathbun v. Geer, 64 Conn. 421, 30 Atl. 60; Auffmordt v. Stevens, 46 Conn. 411; Schilansky v. Merchants' etc. F. Ins. Co., 4 Penne. (Del.) 293, 55 Atl. 1014; Upchurch v. Mizell, 50 Fla. 456, 40 South. 29; Louisville etc. R. Co. v. Bradford, 135 Ga. 522, 69 S. E. 870; McCullough v. Armstrong, 118 Ga. 424, 45 S. E. 379; Bradish v. Grant, 119 Ill. 606, 9 N. E. 332; Streeter v. Streeter, 43 Ill. 155; Illinois Central Ry. Co. v. Cassell, 17 Ill. 389; Zenor v. Johnson, 107 Ind.

69, 7 N. E. 751; Louthain v. Miller, 85 Ind. 161; Reissner v. Oxley, 80 Ind. 580; Warren v. Chandler, 98 Iowa, 237, 67 N. W. 242; Johnson v. Miller, 63 Iowa, 529, 50 Am. Rep. 758, 17 N. W. 34; Snyder v. Kurtz, 61 Iowa, 593, 16 N. W. 722; Aaron v. Tel. etc. Co., 84 Kan. 117, 114 Pac. 211; Crump v. Bennett, 2 Litt. (Ky.) 209; Libby v. Deake, 97 Me. 377, 54 Atl. 856; Randall v. Thornton, 43 Me. 226, 69 Am. Dec. 56; Warner v. Miltenberger, 21 Md. 264, 83 Am. Dec. 573; Baltimore etc. R. Co. v. Resley, 14 Md. 424; American Exch. Bank v. Inloes, 7 Md. 380; Fay v. Dudley, 124 Mass. 266; Smith v. Faulkner, 12 Gray (Mass.), 251; Barcus v. Wayne Auto Co., 162 Mich. 177, 127 N. W. 23; McKenzie v. Sykes, 47 Mich. 294, 11 N. W. 164; Stadden v. Hazzard, 34 Mich. 76; Battershall v. Stephens, 34 Mich. 68; Randolph v. Govan, 14 Smedes & M. (Miss.) 9; Liggett v. Levy, 233 Mo. 590, 136 S. W. 299; Milstead v. Equitable Mtg. Co., 49 Mo. App. 191; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Smith v. Clayton, 29 N. J. L. 357; Porter v. Havens, 37 Barb. (N. Y.) 343; Sellars v. Johnson, 65 N. C. 104; Ryon v. Starr, 214 Pa. 310, 63 Atl. 701; Welsh v. Duser, 3 Binn. (Pa.) 329; Sidwell v. Evans, 1 Pear. & W. (Pa.) 383, 21 Am. Dec. 387; Bedenbaugh v. Southern R. Co., 69 S. C. 1, 48 S. E. 53; Russell v. Arthur, 17 S. C. 477; St. Louis

It is the province of the court to construe and judge of the legal effect of contracts,⁹ of deeds,¹⁰ bills of sale, leases, bank charters and charter-parties,¹¹ and to determine the legal effect of a draft and a promissory note and whether

etc. *R. Co. v. Birge-Forbes Co.*, (Tex. Civ. App.), 139 S. W. 3; *Sanborn v. Roach Drug Co.* (Tex. Civ. App.), 137 S. W. 182; *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116; *San Antonio v. Lewis*, 9 Tex. 69; *Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877; *Bedard v. Bonville*, 57 Wis. 270, 15 N. W. 185. See extended note to *Fagin v. Connolly*, 69 Am. Dec. 454, on this general topic; *Hamilton v. Liverpool etc. Ins. Co.*, 136 U. S. 255, 34 L. Ed. 419, 10 Sup. Ct. Rep. 945; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420, 16 L. Ed. 510; *Goddard v. Foster*, 17 Wall. (U. S.) 123, 21 L. Ed. 589; *Levy v. Gadsby*, 3 Cranch (U. S.), 180, 2 L. Ed. 404; *United States v. Shaw*, Fed. Cas. No. 16,266, 1 Cliff. (U. S.) 317; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Neilson v. Hartford*, 8 Mees. & W. 832.

⁹ *Claghorn v. Lingo*, 62 Ala. 230; *Emery v. Owings*, 6 Gill (Md.), 199; *Williams v. Waters*, 36 Ga. 454; *Streeter v. Streeter*, 43 Ill. 155; *Lowry v. Megee*, 52 Ind. 107; *Thomas v. Thomas*, 15 B. Mon. (Ky.) 178; *Nash v. Drisco*, 51 Me. 417; *Coheco Bank v. Berry*, 52 Me. 293; *Lapeer Ins. Co. v. Doyle*, 30 Mich. 159; *Wagner v. Egleston*, 49 Mich. 218, 13 N. W. 522; *Oliver v. Hawley*, 5 Neb. 439; *Perth Amboy Mfg. Co. v. Condit*, 21 N. J. L. 659; *Rogers v. Colt*, 21 N. J. L. 704; *Glacius v. Black*, 67 N. Y. 563; *Brown v. Hatton*, 9 Ired. (N. C.) 319; *Roth v. Miller*, 15 Serg. & R. (Pa.) 100; *Wason v. Rowe*, 16 Vt. 525; *March*

v. Alabough, 103 Pa. 335; *Berwick v. Horsfal*, 4 Com. B., N. S., 450.

¹⁰ *McCutehen v. McCutehen*, 9 Port. (Ala.) 650; *Seaward v. Malotte*, 15 Cal. 304; *Stark v. Barrett*, 15 Cal. 361; *Rathbun v. Geer*, 64 Conn. 421, 30 Atl. 60; *Montag v. Linn*, 23 Ill. 551; *Symmes v. Brown*, 13 Ind. 318; *Miller v. Shackelford*, 4 Dana (Ky.), 264; *Venable v. McDonald*, 4 Dana (Ky.), 336; *Bonney v. Morrill*, 52 Me. 252; *Simpson v. Norton*, 45 Me. 281; *Woodman v. Chesley*, 39 Me. 45; *Warner v. Miltenberger's Lessee*, 21 Md. 264, 83 Am. Dec. 573; *American Exch. Bank v. Inloes*, 7 Md. 385; *Whiteford v. Munroe*, 17 Md. 135; *Smith v. Faulkner*, 12 Gray (Mass.), 251; *Stadden v. Hazzard*, 34 Mich. 76; *Brewer v. White*, 110 Mo. App. 571, 85 S. W. 641; *Whittelsey v. Kellogg*, 28 Mo. 404; *Dean v. Erskine*, 18 N. H. 81; *Smith v. Clayton*, 29 N. J. L. 357; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Cox v. Freedley*, 33 Pa. 124, 75 Am. Dec. 584; *Mowry v. Stogner*, 3 S. C. 251; *Weir v. McGee*, 25 Tex. Supp. 20; *McCormick v. Cheveral*, 2 Tex. Unrep. Cas. 146; *Howell v. Hanrick* (Tex. Civ. App. 1894), 24 S. W. 823; *Morse v. Weymouth*, 28 Vt. 825; *Hodges v. Strong*, 10 Vt. 247; *Stevens v. Hollister*, 18 Vt. 294, 46 Am. Dec. 154.

¹¹ *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31; *Bettman v. Shadle*, 22 Ind. App. 542, 53 N. E. 662; *Nason v. United States*, Fed. Cas. No. 10,024, 1 Gall. 53; *United States v. Shive*, Fed. Cas. No. 16,278, Baldw. 510.

an alteration in it is material,¹² and to construe wills and determine whether they are executed with the proper formalities, and whether a paper is testamentary in its nature or not.¹³ The construction of a statute, city ordinance, or by-law is a question of law to be determined by the court, and an instruction which leaves such construction to the jury is erroneous.¹⁴ And the question whether or not a city is bound by its charter to keep its sidewalks in repair is one of law for the court to determine.¹⁵ The construction of a *foreign law*, and the interpretation of its meaning and effect, are for the court;¹⁶ as is also the construction of treaties,¹⁷ of decrees¹⁸ and of records.¹⁹ The question

¹² Terry v. Shively, 64 Ind. 106; Turner v. Yates, 16 How. (U. S.) 14, 14 L. Ed. 824; Belfast Nat. Bank v. Harriman, 68 Me. 522. But in Hueske v. Broussard, 55 Tex. 201, it was held that where the true meaning of an indorsement is doubtful, the question may be properly submitted to the jury.

¹³ Willson v. Whitfield, 38 Ga. 269; Warner v. Miltenberger's Lessee, 21 Md. 264, 83 Am. Dec. 573; Sartor v. Sartor, 39 Miss. 760; Magee v. McNeil, 41 Miss. 17, 90 Am. Dec. 354; Burke v. Lee, 76 Va. 386; Riley v. Riley, 36 Ala. 496; Roe v. Taylor, 45 Ill. 485; Watford v. Forester, 66 Ga. 738.

¹⁴ Barnes v. Mayor of Mobile, 19 Ala. 707; Fairbanks v. Woodhouse, 6 Cal. 433; Denver & Rio Grande Ry. Co. v. Olsen, 4 Colo. 239; Peoria v. Calhoun, 29 Ill. 317; Pennsylvania Co. v. Frana, 13 Ill. App. 91; Maltus v. Shields, 2 Met. (Ky.) 553; Bonine v. Richmond, 75 Mo. 437; Bank of China v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268; Laferiere v. Richards, 28 Tex. Civ. App. 63, 67 S. W. 125; Wright v. Fonda, 44 Mo. App. 634.

¹⁵ Bonine v. City of Richmond, 75 Mo. 437.

¹⁶ Consequa v. Willings, Fed. Cas. No. 3127, 1 Pet. C. C. 225; Cecil Bank v. Barry, 20 Md. 287, 83 Am. Dec. 553; Kline v. Baker, 99 Mass. 253; Charlotte v. Chouteau, 33 Mo. 194; Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472; Ufford v. Spaulding, 156 Mass. 65, 30 N. E. 360; Lycoming Ins. Co. v. Wright, 60 Vt. 522, 12 Atl. 103; Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Hawes v. State, 88 Ala. 37, 7 South. 302; note, Thayer, Cas. Ev., p. 154; Sidwell v. Evans, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 387.

¹⁷ Harris v. Doe, 4 Blackf. (Ind.) 369.

¹⁸ Shook v. Blount, 67 Ala. 301.
¹⁹ Hempstead v. City of Des Moines, 52 Iowa, 303, 3 N. W. 123; Adams v. Betz, 1 Watts (Pa.), 425, 26 Am. Dec. 79; Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; Dean v. Grimes, 72 Cal. 442, 14 Pac. 178; McGarvey v. Little, 15 Cal. 27; Gallup v. Fox, 64 Conn. 491, 30 Atl. 756; Crump v. Bennett, 2 Litt. (Ky.) 209; Andrews v. Graves, Fed. Cas. No. 376, 1 Dill. 108.

whether or not a written *acknowledgment of a debt* is sufficient to remove the bar of the statute of limitations is one of law for the court.²⁰ But whether or not letters containing a promise to take the case out of the statute refer to the original debt is a question of fact for the jury, and not of law for the court.²¹ The construction of a written receipt and letters and telegrams is a matter of law for the court, and not of fact for the jury. And whether a writing in evidence is a discharge of a judgment or not is a question of law for the court;²² as is also the construction of a *town plat*.²³ "Of a great part of the writings brought under judicial consideration, it is true that they were made, as Bracton says, to eke out the shortness of human life, *ad perpetuam memoriam, propter brevem hominum vitam*. Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents."²⁴ The legal effect and scope of *written instruments* often involve intricate questions of law which can only be properly passed upon by one well versed in the principles of the law, so that their construction is always a question for the court rather than for the jury.²⁵ But when a written instrument cannot be construed without the aid of parol evidence or the refer-

²⁰ Warlick v. Peterson, 58 Mo. 408.

²¹ Dickinson v. Lott, 29 Tex. 172.

²² Agate v. Sands, 8 Daly (N. Y.), 66; Union Bank of S. C. v. Heyward, 15 S. C. 296; Dobbs v. Campbell, 66 Kan. 805, 72 Pac. 273; Slater v. U. S. Helath etc. Ins. Co., 133 Mich. 347, 95 N. W. 89; Milstead v. Equitable Mtg. Co., 49 Mo. App. 191; Boulevard Globe etc. Co. v. Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704; Foster v. Berg, 104 Pa. 324; Rankin v. Fidelity Ins. etc. Co., 189 U. S. 242, 47 L. Ed. 792, 23 Sup. Ct. Rep. 553; Bliven v. New England Screw Co., 23 How. (U. S.)

420, 16 L. Ed. 510; Higgins v. Fidelity Ins. Co., 108 Fed. 475, 46 C. C. A. 509; affirmed in 189 U. S. 242, 47 L. Ed. 792, 23 Sup. Ct. Rep. 553.

²³ Hanson v. Eastman, 21 Minn. 509.

²⁴ Thayer Cas. Ev., p. 148.

²⁵ Warren v. Miltenberger, 21 Md. 264, 83 Am. Dec. 573; Stevens v. Hollister, 18 Vt. 294, 46 Am. Dec. 154; Peterson v. Lark, 24 Mo. 541; Hurley v. Morgan, 1 Dev. & B. (N. C.) 425, 28 Am. Dec. 579; Adams v. Betz, 1 Watts (Pa.), 425, 26 Am. Dec. 79.

ence to facts outside the writing itself,²⁶ or when its construction *involves questions of fact*, the instrument should be submitted to the jury rather than to the judge to find the facts. But the *legal effect* of the contract is still a question of law for the judge.²⁷ And the authorities are decidedly in favor of applying the rule that written instruments are to be construed by the court, in its full force, to all contracts clearly made out from the correspondence of the parties thereto.²⁸

§ 175b (172). Same—Limitation of the rule as to writings.—Where a written instrument contains technical terms or words peculiar to a particular trade or business, or where extrinsic evidence is admitted to remove a latent ambiguity, or to explain the circumstances connected with the subject matter or surrounding the parties to the instrument, the interpretation of the language of the instrument may sometimes be left to the consideration of the jury for the purpose of effecting the true intention of the parties. It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury. But there are cases in which, from the different senses of the words used, or their

²⁶ *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131, 14 Am. Dec. 669; *Edelman v. Yeakel*, 27 Pa. 26; *School District v. Lynch*, 33 Conn. 330; *Symmes v. Brown*, 13 Ind. 318; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Bedard v. Bonville*, 57 Wis. 270, 15 N. W. 185; *Etting v. Bank*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419; *Gibbs v. Gilead Society*, 38 Conn. 153; *First National Bank v. Dana*, 79 N. Y. 108; *Wheeler v. Schroeder*, 4 R. I. 383; *Taylor v. McNutt*, 58 Tex. 71; *Bradford v. South Carolina Ry. Co.*, 7 Rich. (S. C.) 201, 62 Am. Dec. 411.

²⁷ *Sidwell v. Evans*, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 387; *Fagin v. Connolly*, 25 Mo. 94, 69 Am. Dec.

450, and extended note; *Miller v. Ford*, 4 Rich. (S. C.) 376, 55 Am. Dec. 687; *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294. This proposition is also sustained by the great majority of the cases already cited, *supra*, to this section.

²⁸ *Goddard v. Foster*, 17 Wall. (U. S.) 123, 21 L. Ed. 589; *Luckhart v. Ogden*, 30 Cal. 547; *Auffmordt v. Stevens*, 46 Conn. 411; *Lea v. Henry*, 56 Iowa, 662, 10 N. W. 243; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Russell v. Arthur*, 17 S. C. 477; *Ranney v. Higby*, 5 Wis. 62; *United States v. Shaw*, Fed. Cas. No. 16,266, 1 Chff. 317; *Begg v. Forbes*, 30 Eng. L. & Eq. 508.

obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed.²⁹ When written instruments contain technical terms, or words used in a sense peculiar to some particular art, trade or business, it is proper to leave it to the jury to ascertain and determine the sense in which such terms are employed.³⁰ Where a writing is obscure or ambiguous by reason of its containing unfamiliar abbreviations, or where it is obscurely written, or partially erased, so as to be uncertain and ambiguous, it is proper to leave it to the jury to ascertain its meaning;³¹ but where the ambiguity is in

²⁹ *Brown v. McGran*, 14 Pet. (U. S.) 493, 10 L. Ed. 550.

³⁰ *McAvoy v. Long*, 13 Ill. 147; *Prather v. Ross*, 17 Ind. 495; *Williams v. Woods*, 16 Md. 220; *Smith v. Faulkner*, 12 Gray (Mass.), 251; *Silverthorn v. Fowler*, 4 Jones (N. C.), 362; *Sellers v. Johnson*, 65 N. C. 104; *Brown v. McGran*, *supra*; *Godard v. Foster*, 17 Wall. (U. S.) 123, 21 L. Ed. 589; *Lucas v. Gronong*, 7 Taunt. 164; *Rees v. Warwick*, 2 Barn. & Ald. 113, 106 Eng. Reprint, 308; *Smith v. Thompson*, 8 Com. B. 44; *Simpson v. Margitson*, 11 Adol. & El. N. S., 23, 63 Eng. Com. L. 23; *Bowes v. Shand*, L. R. 2 App. Cas. 530; *Alexander v. Vanderzee*, L. R. 7 C. P. 530. Lord Abinger, in *Morrell v. Frith*, 3 Mees. & W. 404, said: "One case in which the effect of a written document must be left to a jury is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts in which peculiar terms and abbrevia-

tions are employed. So, also, where a series of letters form a part of the evidence in the cause they must be left, with the rest of it, to the jury." And *Shaw, C. J.*, in *Eaton v. Smith*, 20 Pick. (Mass.) 156, said: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage."

³¹ *Holland v. Long*, 57 Ga. 36; *Thursby v. Myers*, 57 Ga. 155; *Paine v. Ringold*, 43 Mich. 341, 5 N. W. 421.

the words of the writing themselves, the court must determine the meaning if it can be done.³²

§ 175c (173). **Same—Criminal cases—**The court decides questions of law.—If it were not for the fact that a few cases have cast a doubt upon the question, and for the provisions in the statutes of five or six states, the right of juries to deal with the law of criminal cases would be regarded as a question from topsy-turveydom rather than as a serious proposition as noxious in its application as it is unjust to prisoner, people, and jury alike. While occasionally a case holds that the jury have the right to determine the law of the case,³³ yet, as we have shown, the great weight of authority establishes the rule that *questions of law are to be decided by the court*. The few exceptions to this rule are mostly cases decided under constitutional or statutory provisions that make the jury judges of the law and of the fact in certain *criminal* actions. The cases which hold that the jury are to determine the law in criminal cases are contrary to the great weight of authority. Many of the cases that seem to sustain this rule really depend upon the fact that in case of acquittal in a criminal prosecution no new trial can be granted whether the jury have taken the interpretation given to the law by the judge or not. This is, however, not because the jury have the right to finally decide the law, but because no man can be tried for an offense of which he has once been acquitted.³⁴ Such famous judges as Baldwin, Curtis, Field, Story, and Thompson, judges of the supreme court and eminent jurists, have emphatically denied the right of jurors to determine the law in either civil or criminal cases.³⁵ Every

³² Morrell v. Frith, 3 Mees. & W. 402.

³³ Many of these cases are in such actions as those for libel. See the case of King v. Dean of St. Asaph, 3 Term Rep. 428, 100 Eng. Reprint, 657.

³⁴ Maryland, Louisiana, Illinois, Indiana and Georgia have such a pro-

vision in their constitutions. For an excellent and exhaustive review of the authorities, see State v. Burpee, 65 Vt. 1, 36 Am. St. Rep. 775, 19 L. R. A. 145, 25 Atl. 964. See, also, Commonwealth v. Porter, 10 Met. (Mass.) 263, a leading case.

³⁵ In the leading case upholding the right of jurors to decide the law

person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land—and not by the law as a jury may understand it or choose, from wantonness or ignorance or accidental mistake, to interpret it. “If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain, from the different views which juries might take of it, but, in case of error, there would be no remedy or redress of the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial or a writ of error, as the nature of the jurisdiction of the particular court may require.”³⁶ The true glory and excellence of the trial by jury is this, that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding

(*State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90), a number of cases were cited in support, but, according to Thompson, J., in *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775, 19 L. R. A. 145, 25 Atl. 964, it appears that every American case cited by the court in *State v. Croteau*, *supra*, not turning upon a statutory or constitutional provision, has since been expressly or in effect, overruled.

³⁶ Mr. Justice Story, in *United States v. Battista*, 2 Sum. 243, Fed. Cas. No. 14,545. Mr. Justice Campbell, in *Hamilton v. People*, 29 Mich. 173, on this subject, says: “It is necessary for public and private safety that the law shall be known and certain, and shall not depend on

each jury that tries a cause; and the interpretation of the law can have no permanency and uniformity, and cannot become generally known except through the action of the courts. . . . If the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible.” See, also, the striking remarks of Wade, C. J., in 3 Crim. Law Mag. 497.

all questions of fact, definitely; and whilst each, within its own sphere, performs the duty intrusted to it, such a trial affords the best possible security for a safe administration of justice, and the security of public and private rights.³⁷

§ 175d. **Review.**—In the preceding sections an effort has been made to show what facts are relevant to various issues in the sense of their admissibility in evidence, and while in all cases the sound discretion and judgment of the lawyer offering or objecting to such evidence is called into play, it is hoped he will find substantial assistance in the illustrations offered for his help. As has been shown, a fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.³⁸ But the most important part for the lawyer's consideration is that which comprises the four great classes of evidence excluded from the main rule, and which in their turn hold so many exceptions that there is often confusion from regarding the four principal exclusions as themselves the rule. If the evidence proffered comes neither under the head of *res inter alios acta*, hearsay, opinion, or character, it is admissible, and there are, as we have endeavored to show partly in the preceding pages and partly as the subjects are treated elsewhere throughout this work, several important exceptions to those four exceptions which render the testimony relevant, and of which numerous illustrations have already been given. It is seldom now that the relation between facts is a new one; in the myriads of cases there is always to be found

³⁷ Shaw, C. J., in *Commonwealth v. Anthes*, 5 Gray (Mass.), 195, the opinion in which is another monument to the learning and wisdom of that great judge. See, also, the

opinion in *State v. Burpee*, *supra*, which has a collection of the leading cases on the subject.

³⁸ Reynolds' *Steph. on Ev.*, Stephen's Introduction, xviii.

some precedent; and it is by patient classification and careful subdivision that the text-writers have succeeded in placing at the disposal of the lawyer the means to discover them. All he has to do is to follow the scheme of arrangement, to be sure that he is seeking an illustration of rule, or exception, or exception to exception, as the case may be; ask himself the relation his facts bear to each other, what they logically tend to prove alone and together, what presumption arises from each with regard to the other, in brief, what common-sense bearing one has upon the other; and he will find that just as there is nothing new under the sun, so with the particular aim of his search, the result of some similar case, involving like principles, has in the past formed the subject matter of some judicial inquiry and authoritative decision.

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